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HEARING

BEFORE

SUBCOMMITTEE OF COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

HOUSE OF REPRESENTATIVES

FEBRUARY 20, 1907

ON THE

CHICAGO DRAINAGE CANAL

AND THE

ILLINOIS AND MICHIGAN CANAL

WASHINGTON
GOVERNMENT PRINTING OFFICE
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CHICAGO DRAINAGE CANAL.

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
HOUSE OF REPRESENTATIVES,
Washington, D. C., Wednesday, February 20, 1907.

The subcommittee on the bill H. R. 24271, consisting of Hons. Fred C. Stevens, William C. Lovering, and Charles L. Bartlett, met this day at 10 o'clock a. m., Hon. Fred C. Stevens in the chair.

There appeared before the subcommittee Mr. Charles L. Walker, of Rock Island, Ill., representing the State of Illinois; Mr. Robert R. McCormick, president of the board of trustees, sanitary district of Chicago; Mr. George A. Schilling, president of the board of local improvements, of Chicago, Ill.; Brig. Gen. George B. Davis, Judge-Advocate-General, U. S. Army, and Hons. Howard M. Snapp, William W. Wilson, and James McKinney, Representatives in Congress from the State of Illinois.

STATEMENT OF MR. CHARLES L. WALKER, OF ROCK ISLAND, ILL., REPRESENTING THE STATE OF ILLINOIS.

Mr. STEVENS. What is your full name, Mr. Walker, and in what capacity do you appear?

Mr. WALKER. My name is Charles L. Walker, and I appear for the State of Illinois and the canal commissioners of the State of Illinois.

Mr. STEVENS. What is your official position, if any?

Mr. WALKER. Attorney for the canal commission.

Mr. STEVENS. Is that a statutory body?

Mr. WALKER. Yes, sir.

Mr. STEVENS. What is their function?

Mr. WALKER. They have charge of the Illinois and Michigan Canal and its lands and property.

Mr. STEVENS. That is the land of the canal described in this bill, H. R. 24271?

Mr. WALKER. Yes, sir.

Mr. STEVENS. Will you please state to us in detail what the position of the canal commissioners of the State of Illinois is concerning this bill, and why?

Mr. WALKER. Well, the canal commissioners and the State of Illinois, as represented by the governor, are opposed to the bill for many reasons. One chief reason is that the State of Illinois has not abandoned the canal or any portion of it. There is no expressed intention to abandon it, so far as I know, and the people at the last election voted against any disposition of the canal.

Mr. STEVENS. In what way did they vote; how did the question arise?

Mr. WALKER. The question arose on a joint resolution. Our constitution provides that the canal shall never be sold or leased or anything else without a vote of the people, and the question was submitted to the voters as to whether any action should be taken toward the abandonment of the canal.

Mr. STEVENS. Voters of the State of Illinois or the district?

Mr. WALKER. Voters of the State of Illinois.

Mr. SNAPP. State the result of that election.

Mr. WALKER. I did; that they voted against the abandonment of the canal or the sale or lease of the canal in any way.

Mr. WILSON. Or any part of it, Mr. Walker?

Mr. WALKER. I have forgotten the language of the resolution, but they voted against any disposition of any part of it.

Mr. WILSON. Is there not some disposition to abandon a part of this Illinois and Michigan Canal in Illinois?

Mr. WALKER. No, sir; not that I know of. The legislature a few years ago passed an act increasing the powers of the sanitary district of Chicago, in which they authorized the sanitary district to construct a channel across the canal, I think, in the Calumet region, without imposing on them any obligation for the restoration of the canal. That is the only recent act on the subject of which I have any knowledge at all. Nothing of that kind was to be done until the sanitary district had connected its channel with the upper basin of the Illinois and Michigan Canal with locks, so that transportation on the canal could get into the sanitary district channel.

Mr. STEVENS. What is the situation as to that project?

Mr. WALKER. I do not know. They are building the locks, but I do not know to what extent.

Mr. WILSON. Mr. McCormick, president of the drainage canal, is here.

Mr. WALKER. At any rate no condition has arisen or is likely to arise within a year or more, as I understand it, by which action will be made necessary and by which the sanitary district will have any right to cross the Illinois and Michigan Canal.

Congress, in 1822, passed an act authorizing or granting a right of way for the Illinois and Michigan Canal, not between the points along which the canal was in fact constructed, and provided that the work should begin or that a map of the location of the canal should be filed with the Secretary of the Treasury within three years. That was never done. No rights were acquired by the State of Illinois under the act of 1822. In 1826 the State memorialized Congress, asking for aid in the construction of a canal, and in 1827 Congress passed an act giving the State lands alternate sections 5 miles wide on each side of the canal after it was located, and it was under that act that the canal was built. There was no reversion of any kind in that act of 1827.

Mr. STEVENS. Then you contend that the act of March 30, 1822, has no application?

Mr. WALKER. No application whatever. The act of 1827 gave to the State of Illinois the absolute fee of this land, with the right to sell it and the right to convey a fee to anybody that they sold the land to, and it contained no conditions or reservations and no rights of any kind to the Federal Government as to title to the land. The only

reservation was the right of the Government to transport its property over the canal without charge. That, of course, was a matter of contract and did not go to the title in any way; and, therefore, the question of the abandonment would not in any way affect the title of the State or give the Federal Government any rights in the land or title to the land. That title is now and always has been in the State of Illinois.

Mr. WILSON. Absolutely?

Mr. WALKER. Yes, sir.

Mr. WILSON. You have had some decisions, I believe, and you told me you had when you were talking with me on this subject, under the act of 1822?

Mr. WALKER. Yes, sir.

Mr. WILSON. Will you refer to them?

Mr. WALKER. If the committee desires to hear them, I will.

Mr. STEVENS. Yes; whatever cases bear upon this proposition, because it is important.

Mr. WALKER. Perhaps I might do that now. The State of Illinois in the case of the City of Chicago *v.* McGraw, 75 Illinois, 566–573, holds that the State acquired nothing under the act of 1822, and the language is this:

> The act of Congress of March 2, 1827, does not purport to be an amendment of the act of March 30, 1822, nor does it, even by inference, refer to it. In our opinion these acts constitute distinct and independent offers by the Government of the United States of aid to the State in the construction of canals, and the latter one having been accepted, without reference to the terms and conditions of the former, the State is only entitled to the grant which it conveys.

The adjudication of that question was commenced before the supreme court of Illinois in the case of Werling *v.* Ingersoll (182 Illinois, 25), and our Supreme Court say in that case:

> It can not be denied that between 1822 and the passage of the act of Congress in 1827 no route had been adopted for the canal and no work of construction had been commenced thereon—and not until January 22, 1829.

Again they say, page 141:

> Upon all the facts in the case it is plain that the act of 1822 was mutually abandoned by the parties, so far as it concerned the land grant, after the passage of the act of 1827, and that the right of way through the reserved sections was treated and regarded as impliedly granted by the latter act, under which the larger grant was made, and that the map was filed under that act, and none was ever filed under the act of 1822.

These decisions would seem to put beyond all question the fact and law that the canal was built under the law of 1827 and not under the law of 1822.

Mr. WILSON. That is the decision of the Supreme Court of the United States?

Mr. WALKER. Yes; the decision of the Supreme Court of the United States.

Mr. STEVENS. What was that last case?

Mr. WALKER. It is the same case that went through the Federal courts and is reported in 181 U. S., page 131, and following.

Mr. SCHILLING. Was not that an agreed case, Mr. Walker?

Mr. WALKER. No, sir; that was a contested case. Mr. Snapp knows that. He was in it.

Mr. SCHILLING. Was that first case that you cited an agreed case?

Mr. WALKER. I understand not. There is nothing that indicates it in the opinion.

Mr. SCHILLING. I have heard since I came to Washington, through Mr. Logan, that he is informed that there was a Supreme Court decision which was on an agreed case.

Mr. SNAPP. It began before a justice of the peace. Of course the facts were agreed upon.

Mr. WALKER. Now the act of 1822 provided—have you 181 U. S. there?

Mr. STEVENS. Yes.

Mr. WALKER. I will call your attention to the provision of that act under which I apprehend the opinion of General Davis was grounded. In fact he told me so, and said he knew nothing about the facts, but assumed the canal was built under the two acts. This act of 1822 says:

That the State of Illinois be, and is hereby, authorized to survey and mark, through the public lands of the United States, the route of the canal connecting the Illinois River with the southern bend of Lake Michigan; and 90 feet of land on each side of said canal shall be forever reserved from any sale to be made by the United States, except in the cases hereinafter provided for.

It was not connected with the southern bend of Lake Michigan. Then the act continues:

And the use thereof forever shall be, and the same is hereby, vested in the said State for a canal, and for no other purpose whatever, on condition, however, that if the said State does not survey and direct by law said canal to be opened and return a complete map thereof to the Treasury Department, within three years from and after the passing of this act, or if the said canal be not completed, suitable for navigation, within twelve years thereafter, or if said ground shall ever cease to be occupied by and used for a canal, suitable for navigation, the reservation and grant hereby made shall be void and of no effect. * * *

SEC. 2. *And be it further enacted*, That every section of land through which the said canal route may pass, shall be, and the same is hereby, reserved from future sale, * * *

You will notice that simply grants a right of way. It grants an easement. It does not undertake to convey a title, but an easement, and provides that if it is not used it shall revert. Had the canal been constructed under that act, and should the State abandon the canal, then the question might fairly arise whether or not the State lost all its right. The supreme court have construed that feature, however, and in another case holds that they did not.

Mr. STEVENS. The court holds that that act of 1822 has no application to the canal as it stands at present?

Mr. WALKER. Yes. The act of 1827 says:

That there be, and hereby is, granted to the State of Illinois, for the purpose of aiding the said State in opening a canal, * * *

Before this act of 1827 was passed the memorial of the legislature to Congress was for aid in the construction of the canal. They could not do it under the act of 1822 and therefore they asked for money. The act of 1827 says:

That there be, and hereby is, granted to the State of Illinois, for the purpose of aiding the said State in opening a canal to unite the waters of the Illinois River with those of Lake Michigan, a quantity of land equal to one-half of five sections in width on each side of said canal and reserving each alternate section to the United States, to be selected by the Commissioner of the Land Office, under the direction of the President of the United States, from one end of said canal to the other; and the said lands shall be subject to the disposal of the legislature of the said State for the purpose aforesaid and no other. * * *

SEC. 2. *And be it further enacted*, That, so soon as the route of the said canal shall be located and agreed on by the said State, it shall be the duty of the governor thereof or such other person or persons as may have been, or shall hereafter be, authorized to superintend the construction of said canal, to examine and ascertain the particular sections to which the said State will be entitled under the provisions of this act, and report the same to the Secretary of the Treasury of the United States.

SEC. 3. *And be it further enacted*, That the said State, under the authority of the legislature thereof, after the selection shall have been so made, shall have power to sell and convey the whole or any part of the said land, and to give a title in fee simple therefor, to whomsoever shall purchase the whole or any part thereof.

Mr. STEVENS. Now, show me how the right of way was carved out and acquired and placed of record.

Mr. WALKER. I understand in accordance with the act of 1827 the survey was made, the plat made and filed of the lands selected by the Secretary of the Treasury, and the odd sections were turned over to the State of Illinois, and the even sections were reserved to the Federal Government.

Mr. STEVENS. Well, then, how did the canal company or the State acquire the right of way through the even sections?

Mr. WALKER. The supreme court of the State of Illinois in this very case holds that the title was granted by the Federal Government through the even sections; an easement was granted through the even sections.

Mr. STEVENS. Then would there not be a reversion on the easement through the even sections?

Mr. WALKER. I think not.

Mr. SNAPP. Let me explain, Mr. Walker, so that it can go into the record, and Mr. Stevens will have it. As has been said, the statute of 1822 authorized the State to mark out the line of a canal through the Government land and required it to make a survey and file a plat within a certain period. A survey was made, but was not filed within the time required. The State always thought until this decision that it had a right of way 90 feet wide along the canal through the even sections.

This case of Ingersoll *v.* Werling was begun before a justice of the peace in Lasalle County. It was brought about in this way: Ingersoll claimed to own to the water, or to the towpath on an even section, by conveyance from the Government. The State claimed a 90-foot strip along the canal. Ingersoll had been in possession for a great many years. The State removed the fence and took possession of a 90-foot strip, and Ingersoll then brought suit in trespass; he brought suit against the assistant superintendent of the Illinois and Michigan Canal. Judgment was rendered against the superintendent in trespass. The State appealed the case to the circuit court, where the judgment was affirmed. They appealed then to the supreme court of the State, and the supreme court of the State affirmed that judgment. I then brought the case by a writ of error from the State supreme court to the Supreme Court of the United States, resulting in the decision in the 181 U. S. The sole issue in that case was whether the State of Illinois took a strip 90 feet wide under the law of 1822 through the even sections.

Mr. STEVENS. That is exactly what we wanted to know.

Mr. SNAPP. In that case in the Supreme Court of the United States the sanitary district of Chicago intervened in this way: They employed an attorney here to represent them. Apparently, however, he represented the defendant in error, Ingersoll. They undertook also in the

circuit court of Lasalle County to pay the judgment against an officer of the State, and set up the payment of that judgment in the supreme court in order to show that the litigation had been disposed of. All these matters appear of record in the case in the clerk's office of the United States Supreme Court here in Washington.

The supreme court, however, as we argued, ignored the payment of the judgment by the sanitary district, the evidence showing that the payment was made by the sanitary district, and decided the case on the merits; decided the contention of the State to the ownership of a 90-foot strip through the even sections, under the law of 1822, against the State. In that case two decisions of the supreme court of Illinois, one in this case and the decision in the 75 Illinois, referred to by Mr. Walker, are cited.

While some of the facts, the historic facts, as to the survey by the State, and other facts, were agreed upon in the circuit court of LaSalle County, it was not an agreed case in the sense that there was no real litigation between the parties, because it was a claim on the part of the State for 90 feet of land on both sides of the canal through the even sections, and that issue is determined against the State. And in that case the Supreme Court of the United States followed the decisions of the supreme court of Illinois, but decided the issue as a new question and held that the State had not complied with the provisions of the law of 1822; that that law was abandoned; that the State took no title to anything under that law; that the canal was built by the State under the law of 1827; but that the State had the right of way through the canal, an implied right of way through the even sections, under the law of 1827. In other words, they practically held in this decision that the State had no title to the 90 feet or anything else under the law of 1822. But, as I have always construed the decision, it simply held that the State has, under the law of 1827, an absolute title by possession to its right of way and towpath, through the even sections, under the law of 1827.

Mr. STEVENS. Do you contend that the Supreme Court holds that the State can acquire a possessory title as against the United States without a specific grant by Congress of that specific land?

Mr. SNAPP. They hold that under the law of 1827 the State was given the implied right to mark out this canal through the public land.

Mr. STEVENS. Across the even sections?

Mr. SNAPP. Across the even sections.

Mr. STEVENS. What right did the State acquire across that land on the even sections?

Mr. SNAPP. The Supreme Court holds that they acquired that right.

Mr. STEVENS. What right?

Mr. SNAPP. The right to the canal and the towpath bank.

Mr. WALKER. According to the decision of the Supreme Court of the United States—

When Congress under the act of 1827 granted the alternate sections to the State throughout the whole length of the public domain, in aid of the construction of the canal, it also granted by plain implication the right of way through the reserved sections, for it can not be presumed the Government was granting all these alternate sections to the State for the purpose avowed, and yet meant to withhold the right to pass through the sections reserved to the United States along the route of the proposed canal. But the implication would not extend to the 90 feet on each

side. It would extend to the land necessary to be used for the canal of the width contemplated, and that had been asserted in an act of the general assembly in 1825 and was subsequently reiterated in another act of that body (1829).

Mr. STEVENS. Do you understand from that, then, Mr. Walker, that that would carry the title from the Government to the State to the 90 feet in the even sections?

Mr. WALKER. Not the 90 feet, but the bed of the canal and the berm-bank through the even sections.

Mr. SNAPP. It was a bitterly litigated suit, and finally determined, as I said, against the State. I would suggest that in this connection the committee get the files of the arguments, the briefs filed in that case.

Mr. STEVENS. That is the only point of this hearing.

Mr. WALKER. Let me call your attention now to another decision of the Supreme Court which elucidates the problem you suggest, and it seems to me to dispose of it in our favor.

Mr. WILSON. Then you contend that the State of Illinois has not absolute title to the 90 feet on either side of this canal in the even sections?

Mr. WALKER. No, sir; the Supreme Court has held not.

Mr. SNAPP. We did contend so, but were defeated in that contention.

Mr. WILSON. Then the Government has some right in this Illinois and Michigan canal?

Mr. SNAPP. It has not.

Mr. WALKER. If the Government has sold the land to the adjoining owners, it belongs to them.

Mr. WILSON. It would depend upon the deeds or conveyances to each individual on the even sections of the land?

Mr. SNAPP. That is a question, of course, between the State and the individual citizens of the State; and their title, of course, depends on the laws of the State.

Mr. WALKER. Now, upon the other proposition you suggest, the question of the effect of the title to this portion of the canal property to the even sections: The only case I have found bearing upon that point is the case of Walsh *v.* Columbus, Hocking Valley and Athens Railway Company, reported in 176 U. S., 469. The Federal Government granted to the State of Ohio 500,000 acres of land in aid of construction of canals. The State of Ohio built this canal that is involved in this case and operated it for a while, and then passed an act of the legislature abandoning the canal, leasing it to a railroad company for the construction of a railroad thereon and the operation thereof. The adjoining owner brought injunction against the railroad to enjoin the railroad company from building its railroad, claiming that the title to the land had reverted to the United States; at any rate that they had lost their right under that. But the Supreme Court of the United States said no, and this is a portion of their opinion, reported on pages 477 and 478:

> That the proposed use of the right of way for a railway was an analogous public use to that of the canal, and was not in violation of the act of Congress or the Constitution.

The language of the act granting the land to Ohio was practically the language of the act of 1827, granting the land to the State of Illinois. The only reservation therein was the right of free transporta-

tion to the Federal Government of its property over the canal, just as the only reservation in the act of 1827 as to Illinois is a similar provision. One of the points invoked was that it was in violation of the Constitution of the United States, invalidating the contract made between the Federal Government and the State of Ohio by reason of the reservation in the grant.

Whether the canal should be maintained forever as such, or should give way to more modern methods of transportation, was a matter of much less moment to the United States than to the State. The General Government was only interested in securing their use for the public and the free transportation of its own servants and property. The object of the act was to facilitate and encourage public improvements, but not to stand in the way of the adoption of more perfect methods of transportation which might thereafter be discovered.

Had the question of internal improvements arisen ten or fifteen years later, when railways began to be constructed, it is quite improbable that the State would have embarked upon this system of canals or that Congress would have aided it in the enterprise.

Waiving the question whether the State could have abandoned the lands upon which these canals were built, as public highways, we think it entirely clear that Congress could not have intended to tie the State down to a particular method of using them, when subsequent experience pointed out a much more practicable method which has supplanted nearly all the canals in use.

There was no undertaking to keep up the canals for all time, and we think the proper construction of the proviso is that the Government should be entitled to the free use of the canals as long as, and no longer than, they were maintained as public highways, and that the act of 1894, leasing those lands to the defendants for an analogous purpose, does no violence to the contract clause of the Constitution.

Were the question one of doubt, we would hesitate long before refusing to defer to the many decisions of the supreme court of Ohio, through several changes in its personnel, holding it to be within the power of the State to abandon the canal for other public purposes, and that such abandonment gave no right of action to private parties incidentally affected or damnified by it.

Then there are cited decisions of the supreme court of Ohio and decisions of the supreme courts of New York, Vermont, Pennsylvania, and Massachusetts.

That, it seems to me, shows that although the legislature should hereafter—it has not done so yet—pass an act abandoning this canal or any portion of it, it still would not require that even the even sections should go back to the United States, because there is no provision therein except the provision similar to that in the Ohio statute, and therefore it would remain in the State. If the State undertook to sell the property to you or me, then another question might arise; but until the legislature by its action determines that it will abandon the canal and determines what the facts of that abandonment shall be, there is no right in the Federal Government to interfere.

Now, you will see very readily that the attempt to do so is to cloud the title to the land in Illinois—to raise a question whether or not the Federal Government still assumes to own that land and exercise some control over it. We say that the Federal Government ought not to do that, that the legislature of the State of Illinois is in control of the property and has passed no law showing an intention to abandon it or showing an abandonment, and, therefore, if there is anything desired by the sanitary district with reference to this canal, they should be relegated to the legislature of the State of Illinois to get their rights and should not come to Congress to ask Congress not only to undertake to interfere in this matter when there is no abandonment, but also in a certain way to cloud the title of the State in the property.

Now, furthermore, with reference to this bill, the bill on its face seems to indicate that the canal lands and the sanitary district lands adjoin one another and that it would be one entire property. Such is not the fact at all. There are railroad rights of way and, I understand, individual property rights and rights of ownership between the sanitary district property and the Illinois property in the Illinois and Michigan Canal; so that it would not give contiguous property or contiguous rights in any way, and there would be no reason why it should be given to the sanitary district.

On the other hand, the question of the value of the property varies from one to two or three million dollars. We say that Congress ought not to undertake, ought not to intimate a purpose, to give to the sanitary district any such money or any such property, and that it would be a wrong, in view of the decision of the Supreme Court, and in view of the rights of this corporation, which is a creature of the legislature of the State of Illinois. It is a branch of the State of Illinois, a municipal corporation organized for the purpose of carrying out stated purposes, in one sense of the word, just as much as any municipality is, and therefore they should go to the legislature for what they want, not to Congress.

It seems a remarkable thing to us that Congress should seek to deprive the State of the property which has been given to the State of Illinois in fee, so far as the odd sections are concerned, and the absolute use of which, as to the even sections, has been given, so far as it is necessary to utilize the purpose which Congress had in mind when it granted the odd sections to the State of Illinois. There is no question of reversion. The only question at all, it seems to me, is the question of the contractual right between the Federal Government and the State of Illinois as to that provision of the act which your committee sees has been construed in a similar case by the Supreme Court of the Federal Government.

Now, of course, my own idea is—I do not know what anybody else's idea is—but my own idea is that, taking this right of way 36 miles long and about 280 feet wide through the odd sections, and I guess 90, or maybe 100 feet wide in the even sections, the real practical use of that property and its value is for railroad right of way, and I apprehend—that is, my idea would be—that if the State ever undertook to dispose of that and ever undertook to abandon the canal, from the very situation and from its value as such, it would dispose of it for railway purposes, and thus bring it under the Ohio case.

Mr. STEVENS. Bring it under the Ohio case?

Mr. WALKER. Yes, sir; and there is no question on the part of the State of Illinois that they will abandon the canal. It does not say that the State is going to abandon the canal.

Mr. WILSON. It implies it. Would it not, as a matter of fact, destroy that part of the canal?

Mr. WALKER. I do not know what the topography is. I would think not. A man looking over the country would apparently see that the sanitary district is higher than the level of Lake Michigan, but I think in fact it is lower. I understand there was some talk about some sewage rights. That is not in the bill, but I understood it was a sort of counter proposition or counter irritant with reference to it. As to that we say, if it is a proper thing to have, the legislature of

Illinois will grant it through its municipal government, and the Federal Government ought not, as to that, pass any act, because the passage of an act or resolution with reference to the canal immediately assumes the theory of some control by the Federal Government over the canal, which we say it has not the right to assume and should not assume.

Mr. LOVERING. Has Mr. Walker stated what are the conditions by which certain rights were reserved to the United States?

Mr. STEVENS. Yes; he claims there were none reserved——

Mr. WALKER. Except the right of traffic.

Mr. STEVENS. As I understand the situation now, then, the only right we have to inquire might be as to the even sections—the portion that is occupied actually by the canal, that has not already been patented by the United States to somebody else, and that the portion which is now occupied by the canal unpatented under certain contingencies might possibly revert to the United States at some time, but none of these contingencies have yet occurred.

Mr. WALKER. Yes.

Mr. STEVENS. That is the situation we are in, and I wanted you to understand that, General [addressing General Davis], because the question might arise at some future time. We have no right over the odd sections, and nothing has been shown to us that the sewage district of Chicago desires a right of way over the even or odd sections.

Now, do you think, Mr. Walker, if Congress should assume to allow a license, so far as it is concerned, over any of its possible interest in that portion of the land in the odd sections, that that would affect the right of the State or the leased property of the State or the Federal Government?

Mr. WALKER. Yes; I think it would.

Mr. STEVENS. In what way?

Mr. WALKER. In the first place, you would not have any legal right to act until an act of abandonment had been passed or had. The canal commissioners could not abandon the canal any more than an individual could. The State legislature must abandon the canal if it is to be abandoned.

Mr. STEVENS. Congress can not affect the rights of a State that the State already preserves under its original grant?

Mr. WALKER. Yes; but even in the conveyance of real estate, suppose I had authority to sell you a piece of valuable property and there should turn up a deed to the General—a quitclaim deed—on the record from the party who originally owned it it would immediately raise the question, What right has the General got? That is a cloud upon my title. You do not want to pay for a valuable piece of property when the General is making some claim to it, although you may say you do not see that the General has any valid claim. But still there must be something there, else the deed would not have been made by the grantor who granted to me.

Now, another thing I might suggest: It would not do any good to the sanitary district, because neither the canal commissioners nor the State of Illinois would recognize any right through that grant. Therefore they have got to come to the canal commissioners or the legislature to get the right to cross, because the statute of Illinois provides that the canal commissioners shall prevent anybody from encroaching

upon the property, and shall have them arrested and puruse a general course in the protection of the property; and therefore it would do them no good and it would injure the State in that question of title which I referred to.

Mr. STEVENS. Have you any questions, Mr. Lovering?

Mr. LOVERING. No. Have you any, General?

General DAVIS. No, sir.

Mr. LOVERING. You consider that the canal has in no sense ever been abandoned?

Mr. WALKER. No, sir. It is running now; at least it was operating before navigation closed and will resume whenever navigation opens again. It has been in continuous operation for traffic ever since it was built.

Mr. LOVERING. Has it been operated for any other purposes than traffic?

Mr. WALKER. There is water power created by this portion of the canal that is covered by this bill. That brings in an annual rental of over $10,000 a year.

Mr. LOVERING. Is it used because it is an advantage to use it or only to keep the title alive?

Mr. WALKER. It is used because it is an advantage, so far as that is concerned, and the general policy of the Government is to keep up its waterways, in order to control the railroads. We all know that a railroad along a waterway has lower rates than elsewhere.

Mr. MCKINNEY. Is it not a fact that the operation of the canal as it is now conducted has an effect upon the railroad rates?

Mr. WALKER. Oh, yes. The experience, as I am informed by the superintendent, is that when navigation closes the railroad rates rise about 25 per cent, and when navigation opens again they fall about 25 per cent.

Mr. STEVENS. General Davis has a question to propound.

General DAVIS. Do you regard the canal as part of the navigable waters of the United States?

Mr. WALKER. No; it is not a part of the navigable waters over which the Federal Government has control. It is an artificial channel entirely. I might explain a little further: As a matter of fact, at Copperas Creek, the Illinois legislature, in order to improve the Illinois River, has built two dams, one at Copperas Creek and one at Henry, and the legislature gave to the State of Illinois the control of the Illinois River for navigation purposes to a point 1,000 feet above the dam. My recollection is that the Federal Government made a grant in aid of the construction of the dam at Copperas Creek. Those dams were built by the State in aid of it, to enable the canal traffic to get down there and through the Illinois River, because it filled up by accretion, and part of it has been a joint work by the Government and by the State of Illinois.

General DAVIS. Of course there are a great many decisions on the subject of what constitutes a part of the navigable waters of the United States. If it were found that the authorities bore pretty strongly that way, that it was a part of the navigable waters of the United States, then the crossing of the sewer, I believe, would be putting an obstruction to it?

Mr. WALKER. Yes.

Mr. McCORMICK. The Illinois and Michigan Canal is the subject of a treaty with Canada. The old treaty says that the citizens of Canada have equal right of transportation with our own citizens upon all the waters of the Lakes and all waters connecting the Lakes with the Gulf of Mexico, and all canals connecting the Lakes with the Gulf of Mexico existing, and all that shall be built in the future. I can not quote you the exact language to-day, but I can get it when I go back to my office.

General DAVIS. There is a long controversy with England as to the right to navigate the St. Lawrence River on the part of Americans, and it has been contended that the St. Lawrence River on our part below Ontario should be regarded as an arm of the sea; and in reply to that contention the British Government have contended that if the Erie Canal, for example, were thrown open to Canadian commerce without charge, they would be willing on their part to throw open the St. Lawrence River and its tributary canals to us. I would not be surprised if there was such a treaty as you mention. There is a good deal of treaty work of that kind.

Mr. STEVENS. Now, Mr. Walker, if any freight were billed or transported in this canal down to the Mississippi River down to the borders of Missouri, that would make it interstate, would it not, and bring it under the control of the Federal Government?

Mr. WALKER. Well, I do not know. The Federal Government is reaching out in that way, so that I do not know how it would be.

Mr. STEVENS. Would it not do that?

Mr. WALKER. I hardly thought so, because of a grant to the State.

Mr. STEVENS. But Congress can not grant away its constitutional authority to regulate commerce?

Mr. WALKER. No; but the mere fact, it seems to me, that I dig a canal myself or have a warehouse off a mile from the Illinois River and I dig a canal myself to the Illinois River and make the connection and transport freight down there does not, it seems to me, necessarily involve the idea that the Federal Government should have any control over the rate which I may charge on my own canal.

Mr. STEVENS. If you have a warehouse and are a common carrier the Federal Government would have, would it not?

Mr. WALKER. Yes; in that case it would. If the effect of the sewage is to destroy the channel, that is something that the Federal Government does not want, because it would then be destroying something given by the authority of Congress.

Mr. STEVENS. General Davis's idea is that we have the authority to regulate the matter in some way.

Mr. WALKER. You would not have the authority to destroy if the effect of digging the sewer, as contended, would have the effect of destroying the canal. In that case even you would not have the power to do that. You could regulate, but not destroy.

Mr. STEVENS. It sometimes amounts to the same thing, you know.

Mr. WALKER. Yes; some of the railroads think so, but that is not the intention of Congress, of course.

General DAVIS. There have been quite a number of decisions since 1890, when Congress began to legislate actively on that subject, and occasionally I find it necessary to go over them, and I find they very

scrupulously regard the right of States in that respect, both as to construction of bridges and piers, and I have thus far found that the legislation as to waters by Congress within a State does not exclude municipal or State control. That is the case as to the Chicago River and the Calumet River.

Mr. WALKER. Of course any legislation of Congress ought to be, and I think would be, in aid of the commerce. The Federal Government would simply undertake to regulate the commerce and not attempt to regulate the channel. They certainly would not regulate the channel, because the State of Illinois some years ago, when the Hennepin Canal was started, passed an act giving to the Federal Government the Illinois and Michigan Canal if they would accept it. They would not accept it. I do not think the Federal Government would have any right to come into the Illinois and Michigan Canal and excavate it, or part of it at all, but it could only control the traffic thereon. But that is far away from the present proposition.

Mr. STEVENS. Do you desire to say anything further?

Mr. WALKER. No, sir.

Mr. WILSON. Mr. McCormick, the president of the drainage commission, is here this morning.

Mr. STEVENS. We will hear Mr. McCormick.

STATEMENT OF MR. ROBERT R. McCORMICK, PRESIDENT OF THE BOARD OF TRUSTEES, SANITARY DISTRICT OF CHICAGO.

Mr. STEVENS. You are the proponent of the bill No. 24271?

Mr. MCCORMICK. Yes, sir.

Mr. STEVENS. Will you please state your views?

Mr. MCCORMICK. Yes, sir. Before beginning I would like to correct Mr. Walker in a mistake that he inadvertently made. He stated he was representing the governor of Illinois, and through him the State. Mr. Walker is mistaken in that.

Mr. WALKER. I was sent by the governor personally.

Mr. MCCORMICK. The governor told me he had no views on the subject, and wished me to elaborate my views so that he could make up his mind and see what was correct. You know he has been elected only two years and has not had time to master all the details of the matter.

Mr. WALKER. I came here at the personal request of the governor, and not at the request of the canal commissioners.

Mr. MCCORMICK. He informed me that you appeared at the request of the canal commissioners.

Mr. WALKER. That was on Monday?

Mr. MCCORMICK. Yes, and to-day is Wednesday.

Mr. WALKER. He telephoned me to come to Springfield last Wednesday, and asked my opinion with reference to the situation, and I gave it to him, and he asked me to come to Washington.

Mr. STEVENS. I do not think that is important, gentlemen. What we want here is the facts.

Mr. MCCORMICK. I want to go into the history of this matter. A great deal can be brought out before we go into the case. I have not gone into the law because the Attorney-General or the Judge Advocate-General held that the title was in the United States, while Mr.

Walker holds that it is in the State. However this may be, I only want it to wind up where it belongs in the sanitary district.

In 1822 and 1827 the Congress passed statutes which resulted in the construction of the canal. The canal was opened in 1848 to traffic. It was not finished, however, in accordance with the plans on which it was begun, because the funds obtained by borrowing money and by the sale of land were insufficient for that purpose. The canal was more or less successful in the succeeding years, but not entirely successful as a waterway; but its most successful years were in the late fifties and during the civil war.

In 1864 the drainage situation became serious in Chicago, and an act was passed by the Illinois legislature stating that Chicago wanted to drain itself and reciting the fact that the canal from Bridgeport to Joliet had not been dug to its entire depth, and that digging it to its proper depth would be equally advantageous to Chicago as a sewer and to Joliet as a waterway. As I remember, at the time of the fire, this money was refunded to Chicago, a pure gift by the State.

It is rather interesting to know that even in 1864 the canal was looked upon by the commissioners more as a revenue producer than as a waterway. It is interesting, because in recent years, as laid down by our supreme court, as a waterway it was abandoned——

Mr. STEVENS. In what way did it produce revenue?

Mr. MCCORMICK. In order to facilitate the deepening of it, they closed the canal a month earlier, closed the navigation, and opened it a month later, which evidently prevented its being used for transportation. At the same time the city of Chicago was required to pay the canal an estimated amount of lost tolls, so that as a revenue producer it was better with navigation partially stopped than if navigation had not been stopped.

Later on Chicago again, through its drainage needs, spent still more money. It installed and operated pumps to get a greater current through the canal, and this water was afterwards used at Lockport and, I believe, at Joliet, for water-power purposes.

Mr. STEVENS. Who obtained the revenue from that?

Mr. MCCORMICK. The State obtained the revenue, what there was.

Mr. SCHILLING. The canal commission?

Mr. MCCORMICK. Yes; it was not paid into the State treasury.

In 1870 in the public mind the idea had become so sure that the canal was no longer a practical affair that they put it in the new constitution of the State that the credit of the State should not be pledged for any more improvements to the canal, nor should any appropriation from the general revenues be made for the maintenance or improvement of it. In spite of this fact appropriations were actually made, until the matter was taken up in the Supreme Court by Mr. Burke, and in the case of Burke *v.* Snively the appropriation was stricken out in the supreme court of Illinois.

Mr. STEVENS. That is held invalid?

Mr. MCCORMICK. Yes; held invalid. As I say, at one time the canal was undoubtedly a used and navigable waterway. But that was in the days of small things, when a small canal could be prosperous. But as time went on and the rest of the country grew, the canal was outgrown and became no longer useful.

In 1875 the tolls amounted to about $100,000, or, in fact, $101,000. The expenditures were about $80,000. In 1901 the expenditures were

about the same, but the tolls were $8,000, and in 1905 the tolls were $4,000.

Mr. STEVENS. Where does the money come from to pay the expenses?

Mr. MCCORMICK. The money in 1900 came in a very queer way. The supreme court rendered a decision in the case of Burke *v.* Snively—I can quote the very words to you, which will probably be better than trusting my memory. The supreme court of Illinois holds that—

> The canal has practically fallen into disuse for any of the purposes of transportation of either person or property, and has been perverted to mere commercial purposes of supplying water power to those along its banks and selling privileges to cut ice from its pools. It is no longer a highway of commerce.

That is found in 208 Illinois, page 58. Also, the canal has rented some of its property that I know of to various powder purposes, for storing dynamite, and has disposed of its property from time to time that it had not disposed of before.

Coming to modern times, the canal was not large enough to act as a sewer for Chicago or be practically a vein of commerce. Along in the eighties it became evident that Chicago had to seek some new means of drainage. I need not go into the various plans that were considered, but the one adopted was that the sewage of Chicago should be taken over the divide at Summit and deposited in the Des Plaines River, and taken on down the Illinois River to the Mississippi. The experts said that the sewage could be diluted to the extent of 20,000 cubic feet per minute for over 100,000 inhabitants.

Then the drainage canal was built. If this canal had been built simply as a drainage canal, taking into consideration the purification of the sewage by dilution, it could have been built at half its cost, or perhaps a little more. As you know, the flow of water depends upon the utilization of the topography of the cross section of the State. The cheapest thing to do would be to cut a comparatively steeper canal and a great deal narrower one. That would have given a current of from 3 to 6 miles an hour, and the same amount of water could have gone through the smaller channel, but it could not have been navigable. The sanitary district act was passed specifically making the drainage canal a navigable stream; and not only that, but a deep waterway—a thing which has been advocated since the time of Pere Marquette, practically. The original drainage law that I have with me recites that in the rock sections the canal shall be nowhere less than 15 feet deep, and in the earth sections nowhere less than 14 feet deep.

In building this drainage canal the waterway feature was so strongly represented in the minds of the taxpayers of Chicago that they built the canal 22 feet deep throughout its entire length. If the canal were intended to be used merely for a sewer it could not only have been narrower, but they could have built truss bridges to span it, which would have been a great deal cheaper than bridges of a movable type. There is a great eight-track railroad bridge which of itself cost nearly $1,000,000. It could probably have been built for a hundred thousand dollars under the other plan. So it was on down the canal; there were 15 or 20 bridges built, all movable. It is obligatory under the law to operate those bridges all the time. The estimate by our bridge engineer is to the effect that to put in the machinery on those bridges alone will require another million and half dollars.

In order to get the flow of water necessary to meet the law—if I am not making myself clear I wish you would interrupt me, the matter is so familiar to me that I perhaps forget that others do not know so much about it—in order to get enough water through the canal they have to get a greater opening to the lake than was afforded by the canal in its former condition. The cheapest way to do that would have been to build a number of large conduits like that at Thirty-ninth street, because at one place the river goes very near the lake and then swings away from it, and by building three or four conduits plenty of water could have been brought in without taking it to the river. However, the navigation feature was still to the fore, and what the district did was to widen the river to 200 feet and also to take out the center bridges and substitute for them bridges of the bascule type. The sanitary district of Chicago, which is almost, as far as area is concerned, equal to the city of Chicago, widened it from 17 feet to 26 feet, and have placed over it from 7 to 15 bridges.

Now, I do not for a minute say that this was all done for the purpose of navigation. It was done primarily for purposes of drainage. But, having once decided to use a certain kind of drainage, a great deal more money has been spent to make it an available waterway. There is no question to my mind that if this work in the Chicago River had not been done by the sanitary district it would have been done sooner or later by the National Government, and the National Government has recognized, as a matter of fact, a certain portion of it, so far, if your present river and harbor bill passes, because it proposes to do on the northern branch what the Chicago sanitary district has done in the southern branch—that is, to bridge it, and has appropriated in the Senate $200,000 for that piece of work.

Up to date the drainage canal has cost about $52,000,000. When it is completed it will have cost about $75,000,000, or two-thirds of the entire cost of the deep waterway from Chicago to St. Louis, and about half the estimated cost of the waterway from Chicago to New Orleans. On the other hand, had the canal been purely a sewerage project, I have no hesitation in saying that the total amount could have been covered, up to date, by $25,000,000, and finally by $40,000,000. But, as I say, for the purpose of navigation, which was incorporated in the State law and added to voluntarily by the people in the sanitary district, the extra amount was advanced.

In view of this fact, and in view of the fact that the sanitary district by next summer will have completed a waterway most of the distance 22 feet deep and the balance of the distance 10 feet deep, to what is known as the Upper Basin of the Illinois and Michigan Canal, there will be no further need of the Illinois and Michigan Canal, even for the fictitious waterway. It is about 2½ feet deep now north of Joliet——

Mr. LOVERING. How deep did you say?

Mr. MCCORMICK. Practically 2½ feet deep; practically that.

Mr. WALKER. It is more than that when in operation. There were over $15,000 worth of tolls received from Joliet to Chicago last year.

Mr. MCCORMICK. I think you are mistaken.

Mr. SCHILLING. Does that include the $10,000?

Mr. MCCORMICK. Not only has this enormous amount of money been spent for the waterway, but eventually over $1,000,000 will have

to be spent to the account of Illinois and Michigan Canal directly, as I will illustrate, if you will permit me. When the drainage canal was being finished, it had to flow its waters through the city of Joliet. The old Illinois and Michigan Canal crossed the Des Plaines River at Joliet, and two dams were built, old-fashioned affairs, that had slack-water navigation as the canal crossed, and then proceeded on the west bank of the Des Plaines River. Those dams produced water power, which came from the water pumped by the city of Chicago; up to the year 1900 by the city of Chicago. In order to get the flow and go through the drainage canal to Joliet, they had to make a change in the nature of the river there. The sanitary district had first to widen it considerably, and then they had to make a modification in the plans. After long negotiation a plan was agreed upon between the sanitary district and the canal commissioners, which left them everything they had, so far as navigation and existing water powers were concerned.

After that contract was agreed to and work was about to begin, and when the canal was almost ready for opening, the canal commissioners took the matter into the open court and claimed that they had made a contract ultra vires, which they had no right to make, and had it annulled. The matter should have been taken into the upper courts, as another contract had been taken; but it was about the time of the opening of the canal, and Chicago was filled with typhoid, and the trustees of the sanitary district did not think they were justified in delaying the opening of the canal a year or two. Then they submitted to the most awful piece of sandbagging that it has been my misfortune to hear of. Having built the canal for $50,000,000 to deliver a flow of 200,000 cubic feet per minute, they were compelled to build a water-power plant, a great dam, a tailrace, a retaining wall, and an underground tunnel, at a cost of $385,000, none of which work was even necessary for the fiction of navigation, and none of which was necessary for any other purpose than the creation of a water power.

Mr. STEVENS. Where?

Mr. MCCORMICK. At Joliet—Dam No. 1. The sanitary district has never received one cent out of this. To show what a valuable water-power plant they built at their own expense, I will only say that the State received——

Mr. STEVENS. I beg your pardon right there, but that is really none of our business.

Mr. MCCORMICK. Very well. Now we come to the question of how much was spent which was not for navigation. The fact is that $385,000 was spent by the sanitary district for purposes other than navigation, for the benefit of the canal commissioners. That, I think, is evident. About the time the canal was to be opened another objection was raised. It was alleged that the opening of the drainage canal would lower the level of the Illinois and Michigan Canal and would interfere with such navigation as it had. The governor of the State refused to grant the permit for the opening of the drainage canal until satisfactory arrangements were made on this score, whereby the sanitary district was compelled to spend another $100,000. After the canal was opened the matter was taken to the State supreme court and thrown out as having been done under duress. It was stated that the contract was signed under duress and could not be enforced. That makes about $500,000 up to date.

Mr. WALKER. Who pleaded ultra viras in that case?

M. MCCORMICK. I am informed that the canal commissioners did in that case.

Mr. WALKER. You will find that the drainage canal people did it.

Mr. MCCORMICK. Now we will come to 1903, to the legislation for the Calumet Canal, the construction of which will render the Illinois and Michigan Canal utterly impossible.

Mr. LOVERING. The construction or the operation?

Mr. MCCORMICK. The construction. It will cut the Illinois and Michigan Canal at a lower level and practically drain it dry. The Calumet Canal will come from South Chicago—the Calumet River through what they call the Calumet channel into the drainage canal, cutting the Illinois and Michigan Canal at what they call the Sag. The law recites that the sanitary district must do this; but inasmuch as doing this will prevent navigation before this canal can be cut—that is, the Illinois and Michigan Canal—the sanitary district must connect the south end of its present channel at Lockport with the Upper Basin Dam No. 1 at Joliet, with a canal not less than 10 feet deep, at the expense of the sanitary district.

I have every confidence that the Illinois and Michigan Canal to-day is not more than 2½ feet deep. But, admitting that it is 4½ feet deep, when the sanitary district substitutes a canal through most of its length 22 feet deep and at no point less than 10 feet deep; when it builds the locks, as it is required to do under this law; when it gives them a large strip of land on its right of way for their operations, does it not seem fair that it should be recompensed in some way, especially as this extra work, namely, connecting the drainage canal with the Illinois and Michigan Canal at Joliet, in itself cost half a million dollars at least? This matter is not one of opinion, it is not one of estimate. Part of it has been finished and the contracts are let on the rest, and the figures can be produced.

Mr. STEVENS. Before you go further, let me ask you this: By "law" you mean a statute of the State of Illinois, do you?

Mr. MCCORMICK. Yes; a statute of the State of Illinois.

Mr. STEVENS. Your contention is, then, that the effect of these various statutes of the State of Illinois authorizing the construction of the sanitary district and canal and authorizing their operation, and the operations by virtue of the statute, constitute a practical abandonment by the State of Illinois of the Illinois and Michigan Canal over the territory we have just been discussing?

Mr. MCCORMICK. That is my opinion.

Mr. STEVENS. We want to get this down, so as to know just what to do.

Mr. MCCORMICK. I want to make this trebly sure. The matter came to Congress because of the opinion in Chicago that the National Government had a certain interest. We wanted this waived; then if there was any question about the interest of the State, we could go to the legislature and have that waived. We came here first because Congress will adjourn before the legislature will. That is the position exactly.

Mr. STEVENS. You contend, then, that the United States has a possible reversion of some portion of the right of way of the Illinois and Michigan Canal?

Mr. MCCORMICK. Yes, sir.

Mr. STEVENS. And that that possible reversion will be under the control of Congress because the State through its various acts in establishing the sanitary canal and giving it authority and the authority as exercised will constitute a practical abandonment by the State?

Mr. MCCORMICK. Yes, sir.

Mr. STEVENS. Of that portion of the Illinois and Michigan Canal covered——

Mr. MCCORMICK. By this bill?

Mr. STEVENS. By this bill.

Mr. MCCORMICK. And if that should be a mistake——

Mr. STEVENS. And that is your contention?

Mr. MCCORMICK. Yes; that is my contention; if we should be wrong in that, we will then ask the State to make a formal transfer.

Mr. STEVENS. We wanted to get a perfect understanding about it.

Mr. LOVERING. You do not seem to have answered Mr. Stevens' first question.

Mr. MCCORMICK. What was that?

Mr. LOVERING. Who bears the expense of the operation of the Illinois and Michigan Canal?

Mr. MCCORMICK. It is paid by the revenue that the canal obtains. But the revenue is not sufficient, and the canal is not maintained. It overflowed our works within a month and cost us heavily. It did $10,000 or $15,000 worth of damage. It has not enough revenue to support itself.

Mr. STEVENS. How is it supported?

Mr. MCCORMICK. It is not supported. It is moribund. The water power derived from the plant provided for the sanitary district provides $12,000.

Mr. LOVERING. Are there salaries paid?

Mr. MCCORMICK. Yes, sir.

Mr. STEVENS. Is there not a superintendent and a corps of laborers to look after it?

Mr. MCCORMICK. The best way to show you what is done in that way is to tell you that it is called, locally, the "tadpole ditch." That is what they call it.

Mr. LOVERING. How much did it cost to build it?

Mr. MCCORMICK. It costs $6,000,000, I believe, to build.

Mr. LOVERING. Eighty thousand dollars was the last figure you gave.

Mr. MCCORMICK. Of the annual expense?

Mr. LOVERING. Yes. That was the time when Mr. Stevens asked you a question.

Mr. MCCORMICK. I would know a great deal more about it, but I sent a member of my office down to look through the public files, and he was refused access to them. I do not know where the money comes from, outside of the two water-power plants and a few leases.

Mr. WILSON. Do they not sell ice?

Mr. MCCORMICK. I will give you the reason why the sanitary district wants this. In the first act there is a clause, as I remember it, that if the Illinois and Michigan Canal is needed for the purposes of the sanitary district, it can be used by any sanitary district within the county within which such district is organized. That means that such part of the Illinois and Michigan Canal as lies in another county, if

needed, can be used without cost. When the original sanitary canal was surveyed, there were a number of routes planned. One of them embraced that canal, but I do not know much about that history. It was not adopted, anyhow. However, our attention is called to the fact that the amount of water taken from Lake Michigan must be limited, and whatever the just limit is I do not know, but there is no question but some limit must be put. That makes certain that the time must come when a pure flow of sewage from Chicago, with what water is allowed, will become a menace to the valley people unless it is treated in some form. We are beginning investigations. We have not got anywhere yet as to what plan must be adopted; but what will be done is this, that some temporary works—not temporary, but what they call settling basins—will have to be established in order to relieve the canal. At that time I expect that the Illinois and Michigan Canal in Chicago will be used to put the settling basins on, and then the sewage will be run half purified into the drainage canal. That plan is down to the point where I can talk about it.

Mr. STEVENS. That is none of our business.

Mr. MCCORMICK. I supposed that you might care to know about it. I have been talking as much as I have mostly because of a letter that I saw from Major Riché. Is your interest upon the legal aspect of it or upon the rights of it?

Mr. STEVENS. We first want to know your opinion of the legal aspect of it, and then, secondly, what reason you think should be given for the passage of the bill.

Mr. MCCORMICK. My opinion of the legal aspect—and as I am not a lawyer I will not put very great store by it, and I am sorry that we have not got our lawyer here, but he is engaged in the trial of a very important case—is that the various acts mark the abandonment; and if they do not, they should. The legislature has imposed upon the sanitary district the expenditure of many millions of dollars that were not drainage. They have imposed the duty of substituting a canal 10 feet deep for the present canal, and the district has been compelled for other reasons to spend another half million dollars directly for the benefit of the canal commissioners.

Mr. STEVENS. You claim that that has been followed by the fact that whatever traffic formerly went by the Illinois and Michigan Canal now goes by your canal?

Mr. MCCORMICK. It will next summer. We would be practically finished now, but a flood came on a month ago and flooded out our works, and we have not been able to finish. By the 1st of August at latest our canal will be finished and will be turned over to the Government or to the State for the operation of traffic, and it will certainly be taken in preference to the little canal.

Mr. STEVENS. Proceed as rapidly as possible.

Mr. WILSON. Are you familiar with the distance between the Illinois and Michigan and the drainage canal?

Mr. MCCORMICK. It is on the map. Between Chicago and Summit they are separated by a railroad right of way. It will show on the map. It is very close all the way. It is widest at Lockport; there it is half a mile.

Mr. WILSON. I did not know but what you knew, so that it could go in the record.

Mr. MCCORMICK. It is very close all the way.

Mr. WILSON. Very near.

Mr. MCCORMICK. Yes.

Mr. STEVENS. But there are intervening rights?

Mr. MCCORMICK. Yes; but from the point of view of the commercial use of the canal, if you wish me to talk of that at all, the Illinois and Michigan right of way, the canal, is needed by the drainage canal. The sanitary district has the right to lease dockage on its canal; the State of Illinois reserving the right to take a part of that rental to itself. The strip on the side of the drainage canal is narrow. It is not sufficient in itself for a man to put a factory there; he has got to go in the back country. Now, if we have our strip here, and then comes the Alton Railroad, and then the Illinois and Michigan strip, and another owner comes in between, he controls not only the back country but the canal as well, because a man can not get access from the drainage canal to the back country, and if he can not do that there is no object in his being on the drainage canal. In fact, we now have a big firm negotiating for a lease. They tried all sorts of ways. One clause they wanted put in was that we should guarantee them access to the drainage canal. We could not do that.

Mr. STEVENS. Is there any right of way of any railroad now on these reserved lands?

Mr. MCCORMICK. Not to my knowledge. There are three railroads from Chicago to Joliet.

Mr. STEVENS. Not on these lands?

Mr. MCCORMICK. Not on the public lands. Now, as to the value of this right of way. It is something that nobody can do more than guess at. The sanitary district bought 70,000 acres of right of way at a cost of about $3,000,000. According to Major Riche's figures the right of way of the Illinois and Michigan Canal is approximately 1,000 acres, and I take it should figure a strip through the even portions as well as through the odd, so that it would be considerably under 1,000 acres. If the same value is to hold true for that 1,000 acres as for the 70,000 acres, that would be about $300 or $400 an acre. But the value will not be as great, as you know. When you condemn property you buy the property at its greatest value for any purpose; so that the district had to pay the high value for that land. The Illinois and Michigan Canal land would not have had any value for farm land. It would not have been valuable for anything but a right of way. The value of the right of way of course comes down to the question of the need for a right of way and the supply and demand. That is not the only right of way obtainable. There is room for a number of them, and the competition is great. There are already four railroads between Chicago and Joliet, and the question of anybody wanting it is exceedingly doubtful. So that our case comes down to this.

In the first place, we are inclined to believe that the rights of the State of Illinois and of the Illinois and Michigan Canal between those two points have been conveyed to us, anyhow. We come down to the point that in the building of the drainage canal the city of Chicago has spent $20,000,000 to make it a waterway for the use of the whole Government. We come down to the point that we have paid to the account of the canal commissioners $500,000, and to build a substitute canal we are spending another $500,000.

Mr. STEVENS. What is that canal?

Mr. McCORMICK. The canal from Lockport to Joliet.

Mr. SCHILLING. The 10-foot canal.

Mr. McCORMICK. That is another $500,000. That will be completed this summer, and when that is completed the Illinois and Michigan Canal from Lockport to Joliet can have no further value whatever. It stands to reason that when you have a canal 22 feet deep nobody will use the canal that is 2 feet deep.

Mr. WILSON. What about the charges?

Mr. McCORMICK. The sanitary district will charge no tollage. Whether the sanitary district will charge a tollage at the lock or not I do not know.

Mr. STEVENS. I wish you would give us a reference to the statutes of Illinois of which you have spoken.

Mr. McCORMICK. I have them all with me in a pamphlet, but I will have to mark them and give them to you afterwards. The canal right of way itself will be of no value further as a waterway, but the sanitary district has built a substitute waterway for the use of the State and the Government.

Mr. SCHILLING. Without any toll?

Mr. McCORMICK. Yes, sir; and has to maintain it forever, and has to maintain the bridges and operate it and receive no pay in return. The abandoned right of way is of no special value except to one who wishes to stand between the sanitary dockage and the back country.

Therefore we feel that the National Government should put us in a position to secure our title from the State forevermore. Furthermore, as Mr. Schilling here says, the southwest portion of the city of Chicago can not drain into the drainage canal until some final arrangement has been made to dispose of the Illinois and Michigan Canal land. The only way of doing it satisfactorily is to put those lands in the hands of the management of the ditch that exist for drainage. If it goes to the railroad company or to private owners, unless your act is very carefully drawn they may maintain that there is no right of way for easement purposes.

That is all I have to say.

ADDITIONAL STATEMENT OF MR. CHARLES L. WALKER.

Mr. WALKER. As to the questions that Mr. McCormick has suggested with reference to the tolls and that feature of it, and the question of the future size of the sanitary district, that it has only been for sewage and that it had not been made for a deep waterway, and the amount of the tolls, and the contracts with the Illinois and Michigan Canal that he talks about, if it had not been ultra vires, with that we have not now anything to do.

However, Mr. Snapp was attorney for the canal during the time of which he speaks, and he can give you gentlemen any information that you desire as to that situation. It does not cut any figure in this situation at all.

Mr. STEVENS. Only in this way, that Mr. McCormick contends that all these things constitute a part of the design of the State of Illinois to abandon the Illinois and Michigan Canal for navigable purposes along that stretch.

Mr. WALKER. Yes, sir; but it seems to me it would not have anything to do with the propriety of the passage of this bill. He talks

about being reimbursed. If the Federal Government wants to reimburse them, if the Federal Government wants to give them $1,000,000 that they have expended in order to get a deep waterway, that is a different proposition; but we say that the Federal Government ought not to be asked to undertake to give property that belongs to the State to the sanitary district. That is for the legislature itself to do.

The question of the effect of the construction of this channel across the channel of the Illinois and Michigan Canal—I do not know what idea the legislature has. The people evidently had an idea that the canal should not be done away with in any way, as the constitution provides, and, therefore, if the legislature has intimated anything, I assume that the legislature will change that intimation when it has received the vote of the people and knows the will of the people on the proposition.

Mr. STEVENS. Will you follow it as to the exact proposition that was submitted to the people and the requirement of the constitution of the State as to what should be done and the vote of the people at the last election, so that it can go into the record?

Mr. WALKER. I do not know that I can give you the vote at all. Mr. McCormick has said something about the question of dockage rates that the Illinois and Michigan Canal reserves on that. My understanding is that all that is in this act, and this act provides that a certain section of the land which is on the sanitary district channel shall be given to the State upon which the State can construct its docks. There is no question of dockage fees, as I recollect, but even if there were it seems to me it would not cut any figure on that proposition. If the State, in order to protect the Federal Government, provided that the transportation of the Federal property over the big canal should continue, that may have been for the purpose of any interruption during the period of construction or what not; at any rate it undertakes to protect the contract relation between the Federal Government and the State of Illinois, as provided by that law.

Mr. McCormick says they came here to you because you adjourn before the legislature adjourns; but they have not introduced any bill in the legislature asking anything of the kind that I have ever heard of, and there has been just as much time to get relief from the Illinois legislature as there has been to get relief from your body; and therefore it seems to me there is nothing in that proposition.

As to the destruction of the canal by the building of the Calumet channel through the sag across it, there is nothing in that proposition, because the sanitary canal is very much lower than the Illinois and Michigan Canal, and it can be carried across on an aqueduct, as in the case of some other streams; so that there is nothing, as the bill itself provides, it seems to me.

In regard to the sandbagging proposition, I do not know anything about that. I was not the attorney for the canal commission at that time; but I say that Mr. Snapp was, and he knows about that. I do not know anything about the canal being closed for one year. If the question of rentals, of income, cuts any figure, the canal commissioners want to be heard upon the question of fact. I did not believe there was a question of fact. I supposed that it did not make any difference to the Federal Government whether the canal paid or did not. It does not make any difference. It is being operated as required, at no expense.

Mr. LOVERING. At no expense to the State? At no expense to the Federal Government?

Mr. WALKER. Yes, sir; no expense to the State except for the revenues that come to the canal itself.

Mr. WILSON. What are the revenues of the canal?

Mr. WALKER. I do not know. I may be mistaken as to the amount I stated; but I know that Norton & Co. paid $10,000 a year under their contract—have paid that—for their water power, and they also paid tolls on the canal. Just what they amounted to I do not know, but I have understood that they amount to quite considerable—in the neighborhood of $5,000.

Mr. WILSON. Does not the canal also pay Norton & Co. for certain services?

Mr. WALKER. No, sir; not that I know of; none whatever. So that it seems to me, if your honors please, that the question here is this. No fact of abandonment is now in existence. No definite action has been taken by the State of Illinois that shows that it is going to abandon the canal, and I think we all agree that under no law can there be any right in the Federal Government nor ought the Federal Government to exercise any control or take any action in regard to it until the State itself undertook to abandon the canal.

And in connection with the rights that the sanitary district has had, they get them all from the State; it is a branch of the State, and they ought to go to the State to get any relief they desire. I believe that is all I care to say.

ADDITIONAL STATEMENT OF MR. McCORMICK.

Mr. MCCORMICK. I have several extracts here from the laws relating to the sanitary district of Chicago, which I would like to read. The first is in the new act authorizing the construction of the Calumet Canal. The first part merely says how the canal shall be built and what size it shall be. Then it reads:

Provided, however, That before any such channel is constructed across said Illinois and Michigan Canal, or the navigation of said canal in any manner interfered with, said sanitary district of Chicago shall connect its present main channel from the controlling works at Lockport with the upper basin of the Illinois and Michigan Canal at Joliet by a channel of a depth of not less than ten (10) feet and a width of not less than one hundred and sixty (160) feet through its entire length, in which channel so to be constructed said sanitary district shall provide and construct a lock or locks of the size of at least twenty-two (22) feet in width by one hundred and thirty (130) feet in length between miter sills, connecting upper and lower levels, and provide suitable protection for water craft in using said locks and channel. Said locks shall be constructed of the most approved pattern of their size, and to be perfectly safe for use and be equipped with machinery to operate the same; and if only one lock is constructed it shall be provided with double gates to prevent accident, and said sanitary district shall forever maintain and operate the same.

Provided further, That said sanitary district shall furnish and provide at said lock a site of the dimensions of at least 20 by 30 feet, upon which the State, through the canal commissioners, shall have the right to erect a suitable office building and keep an agent therein, and the canal commissioners shall have such authority in and about said lock as is necessary to enforce the rules and regulations prescribed by them.

* * * * * * *

3. Said sanitary district shall permit all water craft navigating or purposing to navigate said Illinois and Michigan Canal to navigate the water of all said channels of said sanitary district promptly without delay and without payment of any tolls or lockage charges for so navigating in said channels.

There is a clause in here applying to the Illinois and Michigan Canal.

Mr. SCHILLING. Can you find that clause that relates to the abandonment of the canal at a certain point, or which provides that it may be declared a nuisance?

Mr. MCCORMICK. That is what I am looking for.

Mr. SCHILLING. We had it here the other day, Mr. Chairman, the Illinois statute.

Mr. MCCORMICK. Here it is:

and shall also have the right to construct a channel across the Illinois and Michigan Canal, without being required to restore said Illinois and Michigan Canal or said feeder to its former usefulness. If by reason of said abandonment a stagnant stream or pool of water shall remain upon the deposits of Chicago sewage, accumulated in said city of Chicago as a sewage outlet, said sanitary district shall fill up said canal to a depth sufficient to remove said condition and prevent the spread of pestilence and disease throughout the territory in which said Illinois and Michigan Canal is abandoned.

If that is to be done, it will cost another million dollars, at least.

Mr. STEVENS. Where would that be?

Mr. MCCORMICK. From Joliet to Chicago.

Mr. WILSON. Where the locks are built.

Mr. STEVENS. Over the portion covered by this bill?

Mr. MCCORMICK. Yes, sir.

Mr. SCHILLING. And that construction, now, cutting through the Illinois and Michigan Canal, which will break its continuity, is now being done by the sanitary district?

Mr. MCCORMICK. Yes.

Mr. SCHILLING. And you say that will be accomplished by August, at the very latest?

Mr. MCCORMICK. August 1, at the very latest, barring acts of God.

Mr. SCHILLING. And you mean to say after that is accomplished and those locks are built it can not be used from that point north?

Mr. MCCORMICK. Certainly.

Mr. WALKER. No.

Mr. MCCORMICK. It can not be, and it will not be. The canal costs about $10,000 a year, at least, more than it brings in; and when they get the big canal furnished free of cost it is inconceivable that they should continue the use of the other, and within a year we will cut the Illinois and Michigan Canal short in two.

Mr. WALKER. Why, you will not have your locks finished by that time—the 1st of August.

Mr. MCCORMICK. I beg your pardon; they will be.

Mr. WALKER. I do not think that your engineer will say so.

Mr. MCCORMICK. My engineer says the 1st of June.

Mr. WALKER. I do not think anybody else will say so. And you can not cut the Illinois and Michigan Canal, you can not begin to cut it, until after you have done that, and you would not in the very nature of things, I should think, commence the cutting of the Illinois and Michigan Canal until you have fixed your rights that govern through the Calumet region; so that there can be nothing done except that, as Mr. McCormick says, it will be useless to maintain the old canal after the connection is made. But that does not interfere with the fact that it may be operated, and does not interfere with the fact that the State has not permitted any act of abandonment.

Mr. WILSON. Just one question before you finish. I spoke to Mr. Walker about the income of the Illinois and Michigan Canal and the contract that it had with Norton & Co. in Joliet. Are you familiar with that?

Mr. MCCORMICK. Yes, sir.

Mr. STEVENS. I do not think that is material to the issue here.

Mr. MCCORMICK. It has the revenue and the profit.

STATEMENT OF MR. GEORGE A. SCHILLING, PRESIDENT OF THE BOARD OF LOCAL IMPROVEMENTS OF CHICAGO, ILL.

Mr. SCHILLING. I find myself, Mr. Chairman, in a singular situation. Some months ago I called on Mr. McCormick, the president of the drainage board, and reminded him of the fact that the board previous to the one he is now a member of had made an agreement with the board of local improvements of Chicago to pay 40 per cent for the construction of the conduit over Bubbly Creek, Chicago, which is about Thirty-ninth and Roby streets, to go westward to the avenue, and from there to the outfall of the sanitary channel, and I asked him if he thought there would be any trouble in carrying out that agreement, and I called his attention to the fact that that entire district there, twenty miles square, had no drainage. He said, "Certainly, if the drainage is necessary and the previous board has entered into this arrangement, we will help to carry it out."

I then called his attention to the fact that there was a feeling in the minds of some of the lawyers of Chicago, including the legal department of our board, that the United States Government had some claim there, and that unless we got a permit from Congress enabling us to go through the Illinois and Michigan Canal with those sewers we might be interfered with in a legal proceeding confirming special assessments, and because of that I thought it would be wise to get the consent of the United States Government to pass through the Illinois and Michigan Canal, and also the consent of the State of Illinois.

Mr. STEVENS. You do not know whether you want to pass through one of the even or odd sections, do you?

Mr. SCHILLING. No, sir; I do not. The fact of the matter is, Mr. Chairman, that until we had this thing thrashed out, I was under the impression that there were two distinct grants, one a right of way which was continuous, and the other the alternate sections; but it seems, according to the statements made this morning, that that original grant, the continuous right of way, was not taken advantage of, and now it seems that you have simply an alternate grant, with an easement.

Mr. STEVENS. So that if those two branches of your main sewers that you desire to pass through the Illinois Canal were in an odd section, that is Kedzie and Western——

Mr. SCHILLING. Yes, sir; Kedzie and Western.

Mr. STEVENS. You would have no business here, and we would have no business with this?

Mr. SCHILLING. No, sir.

Mr. STEVENS. So that, so far as you are concerned, you would have no standing before the court.

Mr. SCHILLING. I am trying to explain why even this bill is before the committee. The motive that prompted it, although I did not see

it until I came to Washington, was the desire of the city to pass through the canal with those two trunk-line sewers, which in the nature of things would elevate its navigable features at those points, because our engineers in taking surveys concluded that the top of the sewers would be somewhat above the bottom of the canal; and unless we got such permission from the United States any taxpayer might make the claim that the United States Government had some rights in those dams; and although finally the courts might construe it that the State of Illinois had supreme jurisdiction, there would be enough there to make a peg to hang a legal hat on.

Mr. STEVENS. Do you contend that the United States has a right to destroy the navigability of navigable waterways?

Mr. SCHILLING. We take the position here, and our appearance is based on the assumption, that the United States may have such a reversionary right, and not that our act would impair the navigability of the canal; because we deem that the case of the State of Illinois, which Mr. McCormick has related to you, would imply a desire on the part of the State to abandon that portion of the canal through which we shall go with our sewers. So that we assume, with all of this legislation on the part of the State, that there will be no trouble for us to secure a permit from them to do this. But in the absence of a permit from the United States Government, we think it would give any fighting property owner sufficient standing in the court to cause litigation for many years, perhaps, before the issues could be finally adjudicated. Meanwhile our people were dying out there with pestilence and disease because they had no drainage.

Now, with the interest that I represent, the dominant desire is to construct those sewers and not care particularly who those lands are to be passed on to. That is one of the unfortunate positions that I find myself in as representing the board of local improvements. Mr. McCormick is on the one side asking that these lands be passed to the State of Illinois and that a provision be made that then the State shall pass them over to the sanitary district. Against that I have no objection at all, except to say that if this bill is passed—and I want Mr. McCormick to listen to this—if this bill was passed by Congress and the State of Illinois paid no attention to it and did not pass the lands over to the sanitary district we would not get our sewer, very likely, and we would be just where we were before the bill was passed; and the State of Illinois, through its canal commissioners and its legal department, might contend, just as Mr. Walker has contended here this morning, that the State of Illinois has up to date violated no agreement with the United States Goverment, and for that reason the United States Government had no right to make cessions of the lands which were given to the State of Illinois under certain agreements and conditions, all of which, up to date, had not been violated; and if they finally won out, which again, perhaps, would be after years of litigation, we would still be there without a sewer.

Before I left the city of Chicago we had the citizens' committee appropriate $7,500 to put our force to work—all our office force—and the property owners within that area to make a list, and as soon as the list—the scrapping sheet—was completed they would be prepared to hold a public meeting. I am citing this to show you with what interest we are proceeding to try to drain these 24 square miles of territory on behalf of the people who are already living there—a ter-

ritory which is capable of maintaining a million people and which is held back because the people have no drainage—and they do not desire to live there, and those who have homes there are thinking about leaving because of the danger they are constantly subject to by reason of having no way of getting rid of their sewage.

Now, I think that owing to the lateness of the session and the different interests that play around this bill, the opposition to it, possibly Mr. Walker and Mr. McCormick, might join with me in giving consent that this committee should substitute a simple permit to the city of Chicago for the construction of the Western avenue and the Kedzie avenue sewers through the Illinois and Michigan Canal, with an outfall into the sanitary channel. After that we can take up the bill which has been introduced here by Mr. Wilson and fight that out when we have a little more time, and thus we will not cause 60,000 people to continue suffering there as they are doing now simply because there is a contention here as to who these lands belong to and where they should go. That does not help those people any. And I now formally ask Mr. Wilson and Mr. McCormick whether they would not join the city of Chicago in asking for such a permit, and I am willing to here agree that it should read on condition that similar conditions should be granted by the State of Illinois.

Mr. LOVERING. How soon could that be done?

Mr. SCHILLING. All the clerical force of the board of improvement is working every night and every day now. I would like to have this permit, whether conditioned on the consent of the State to give a like permit or an independent permit. I think that possibly, as the general assembly is in session, we will get one from them. But I am perfectly willing, if that will satisfy Mr. Walker, that your consent should be conditioned upon the consent of the State of Illinois, and assuming that we will get that shaped up so that no property owner can go into court and say that the United States Government has a right to these lands, and then give a permit to construct these sewers, and thus overcome the impression that the board of improvement is trying to commit an illegal act by going over lands over which it has no right, and we can let the contract to start work about June for the construction of those sewers.

Mr. LOVERING. How long will it take to complete them?

Mr. SCHILLING. It would take, in my judgment, about two years to construct those two large trunk lines.

Mr. STEVENS. It seems to me from the statement that Mr. Walker has made the odd sections have already been sold and the United States has granted all of its rights. If the main sewer went down through those sections, you do not need to come to Congress.

Mr. SCHILLING. That may be true, but I did not know it until this morning. I was always under the impression that 90 feet on each side of the canal was a continuous, unbroken right of way.

Mr. STEVENS. We do not want to pass any idle act. We do not want to pass any act unless you can show that it is necessary, and it seems to me you can get your relief some other way.

Mr. SCHILLING. I confess——

Mr. STEVENS. This Congress has not any right to adjudicate the claims of the State of Illinois as to this land. We can not do that. All that we can do is to preserve the rights of the United States or to control the rights of the United States in that property. That is all we can

do. Now, what rights we have are disputed, evidently, by the State of Illinois. Mr. Walker is here to notify us that they dispute our claim to a reversion, and whatever claim we have is disputed as to extent and as to title. Now, with that dispute, and an act such as you ask, if concurred in by the State of Illinois, it would be an abandonment by them of that portion of the canal, clearly and expressly, and it would make acute the expression between the United States and the State of Illinois as to that portion of the even-numbered sections. You are asking them to abandon that section of the canal, and I do not believe they will do it.

Now, in view of that, is it not the easiest way about, where that odd-numbered section is open to you, to run your sewer down that section?

Mr. SCHILLING. That may be the solution of it; but of course, being governed by such legal counsel as I took before leaving Chicago, and then coming to this city and seeing the opinion rendered by General Davis and the report of Major Riché, it all tends toward the thought that I had come here with, that the United States did have a reversionary right in those lands.

Mr. STEVENS. Another thing; you are asking us to decide prematurely, according to the statement of Mr. McCormick, as to whether or not there is an abandonment. Mr. McCormick claims that there is a practical abandonment. As to whether or not there is an actual abandonment is another proposition. Congress is always reluctant to disturb existing conditions. Now you are asking us to rush in and disturb conditions prematurely when it does not seem to me that you show a necessity for it.

Mr. SCHILLING. I can only repeat again that such counsel as I have had, and that seems to have been confirmed by General Davis and Mr. Riché, has been to the effect that the United States did have a claim; and that being the case, we thought we could remove such a legal barrier as any property owner might raise by securing a permit that would not prejudice the interests of either the United States Government or the State of Illinois in the Illinois and Michigan Canal.

Mr. STEVENS. We would not yield any claim of the United States under any circumstances; that much we will not concede.

Mr. SCHILLING. Here is a dispatch which I sent, wishing to be backed up while here in the city, and showing the urgency of the matter I am speaking of. I would like to read this dispatch [reading:]

WASHINGTON, D. C., *February 4, 1907.*

JOHN A. MAY, *203 City Hall, Chicago, Ill.:*

Ask mayor to wire Secretary of War Taft to give aid consistent with the interest of the National Government for remedial legislation that will enable us to construct the Western avenue and Kedzie avenue sewers through the Illinois and Michigan Canal.

Hittell gone to Chicago to-day. Sewer problem for us. Me to stay. Letter follows.

GEO. A. SCHILLING.

So that at no time have I ever requested anything that would make you gentlemen feel that I am calling on you to abandon any interest that you have.

Now, that is the position we are in. I can only say to you gentlemen of the committee, and to you, Mr. Walker, and to you, Mr. McCormick, representing these other two bodies in our State, I representing the city of Chicago, that our citizens in this district are sweating blood for relief. They want it, and they ought to have it; and if this

committee can issue such a permit, and have it passed, as will leave intact the interests of both the United States Government and the State of Illinois, I should like very much for it to do it. This sewer proposition has been pending in our department for some seven years, and it is because of such things as this that our board has been prevented from putting through the improvement.

Mr. STEVENS. It seems to me that you do not keep on very good terms with Colonel Walker or the sanitary district.

Mr. MCCORMICK. I have no objection to such a permit.

Mr. WILSON. I would have none.

Mr. WALKER. The effect of constructing the sewer will be to destroy the canal. The top of his sewer, according to his own statement, is going to be above the bottom of the canal.

Mr. SCHILLING. Yes, sir; that is right.

Mr. WALKER. I would have no right to consent to any such proposition for the State of Illinois, and the legislature would have no authority to consent to it. The only resolution that it seems to me would be at all competent or right would be an absolute abandonment by the Federal Government of any control over the situation, and that, I apprehend, you would not consider at all?

Mr. STEVENS. No. On the other hand, any possible act that we would pass would reaffirm any possible right that we had, and would notify the world that we did have such a right.

Mr. WALKER. Yes; and that ought not to be done unless there was a clear right to it.

Mr. STEVENS. It not only would not go through our committee, but it would not stand in the House for an instant. You want to look at the situation as it is. You do not want to fool yourself in this proposition. What you ask, Mr. Schilling, would require the practical abandonment of that section of the canal. According to Mr. McCormick's contention it is abandoned. That would be a form of abandonment; there is no question about that.

Mr. SCHILLING. Here, Mr. Chairman, is the unfortunate predicament of the city of Chicago with respect to these sewers. If the State of Illinois should abandon it, we would have no right of way if it should result in litigation between the Government and the State of Illinois as to who owns the odd sections, and we would be in the same position as we have been in right along.

Mr. STEVENS. You do not know whether you want the odd sections?

Mr. SCHILLING. I know that, but of course you do not blame me for not knowing about that.

Mr. STEVENS. Yes; your attorney should have informed you. I blame you. I blame the officers of your local improvement board for not coming before us with a definite proposition as to what you know. Now, you do not know. It is the business of your attorneys to know just exactly, and they do not know. They do not know where they stand or what they want.

Mr. SCHILLING. You and Congressman Burton and one or two others read the statutes which have been passed, and you were all then of opinion that the statute passed in 1822 was not at all modified by the subsequent statutes.

Mr. STEVENS. We read them and supposed that the canal was constructed under the statute of 1822 as modified by the statute of 1827; but the Supreme Court of the United States, in construing those

statutes and the rights under them, has held that the statute of 1822 did not apply.

Mr. McCORMICK: You were not familiar with that fact?

Mr. STEVENS. They never told us the facts.

Mr. SCHILLING. I did not know those facts. This morning is the first time we have been informed of this. I can only say that I went to the canal commissioner the other day and he called my attention then to the fact that they could not grant a permit for us to do this, and called my attention to the navigable feature of the canal, and that they were obliged to continue that, but he also called my attention to the statute that Mr. McCormick has read this morning and said that after this work had been completed, which is referred to in this statute, then the State will abandon the navigable feature of the canal from this point to that, and possibly then such a thing could be done.

Mr. STEVENS. Until that time there is no use coming before Congress.

Mr. SCHILLING. Later it was held that the United States Government had some rights, and that it would be wise, in order to prevent such disagreeable litigation as might ensue, to get the permission of the United States Government to go through the canal, either upon condition or without condition that the State of Illinois should consent; but I am willing to have it provided that the State of Illinois should give its consent.

Mr. STEVENS. I do not think your attorneys have advised you well. You should have gone to the State of Illinois, and then, if they refused, there would have been no use in coming to Congress. We have no right until after they act. After they have acted and abandoned that stretch of the canal we may have some rights, and then we will see what we can do. But until that time comes I do not see how we could do anything about it. I am speaking with reluctance, but it does not seem to me you are in a hopeless situation, but it strikes me you have another avenue of relief.

As to this permit, the Secretary of War has reported strongly against it, and there is not a member of the committee who would vote for it, and it would not pass through the House if they did, and I think to ask for such a thing now would be premature. That is my opinion. Mr. Lovering can tell you what he thinks about it.

Mr. SCHILLING. Of course if that can not be granted, I have nothing more to say about it.

Mr. LOVERING. I do not think it is possible to do anything at this session.

Mr. SCHILLING. Then, of course, I have nothing more to say. As to the urgency of the need of these sewers, I suppose you are all convinced.

Mr. STEVENS. Oh, yes.

(At 12.20 o'clock p. m. the committee adjourned.)

CHICAGO, *February 6, 1907.*

MR. GEORGE A. SCHILLING
(Care of The New Willard, Washington, D. C.).

DEAR SIR: In regard to the proposition to drain the Western avenue sewer and Kedzie avenue sewer through a main sewer to run eastward on Thirty-seventh street, or some adjacent street, to the Chicago River, I beg to say that such a sewer would have to extend as far east as Ashland avenue or more.

In order to drain the territory which it is proposed to drain by means of the Kedzie avenue sewer and the Western avenue sewer, it would have to be at least 12 feet in diameter, and very likely larger. The surface of the ground east of Western avenue is less than 10 feet above Chicago datum. This means that with a sewer put as low as possible the top of the brickwork would be about at the surface of the ground; and, although the grades of the street are about 3 or 4 feet above the surface of the ground, the sewer would be so shallow that when flowing full it would flood any basement in its entire course. The cost of such a sewer would be excessive, and it would be more economical to build inverted siphons under the old canal and to drain directly south to the sanitary district canal, if we are unable to cross the old Illinois and Michigan Canal in the manner that we propose.

If necessary, I am ready to come to Washington to explain matters to the committee, but I do not consider that I can make matters any clearer than the above statement does. It seeme to me that there can be no good objection to the actual abandonment of the old canal north of Lockport when the new locks are in place, although there may be serious objection for various reasons to turning the old canal and adjacent lands over to the sanitary district. If there seems to be much opposition to such a procedure, I would suggest that Congress be asked to merely relinquish any claims the Government may have on this canal to the State of Illinois, and leave the matter of final disposal of the lands to the State.

Yours, very truly,

C. D. HILL,
Engineer, Board of Local Improvements.

CHICAGO, *February 11, 1907.*

Mr. GEO. A. SCHILLING
(Care of The New Willard, Washington, D. C.).

DEAR SIR: Yours of February 9 just received.

In regard to building sewers in Kedzie avenue and Western avenue, so that the top of the brickwork will not extend above the bed of the old canal, I will say that such construction is possible, though not advisable. In fact, I had plans for such a sewer in Western avenue prepared, and submitted the same to Mr. Ra dolph for approval; and while he approved it under the conditions that had previously existed, viz, that the old canal was in existence and had to be considered, he declined to approve it under the new conditions, which were that the old canal would no longer be used after the necessary lapse of time for the construction of the sewer. In other words, such a sewer can be built if it be determined to maintain the old canal as a navigable stream. The cost of such construction will be considerably greater than if the sewer were run straight through at the regular grade, and the cost of annual maintenance will be considerably greater, for the reason that there will be a deposit of sand and gravel that may be washed into the sewer in the deepest portion under the canal.

At one time I prepared a plan for a sewer in Kedzie avenue to pass under the old canal by means of an inverted siphon. These plans were submitted to the State commissioners, and finally received their approval, depending upon the city entering into a proper contract relating to the matter. When this contract was submitted to Mr. Blocki, superintendent of public works, he declined to sign it, for the reason that he was convinced that the old canal would be abandoned and that such a con-truction would be expensive to build and maintain and that it would be impracticable to proceed with such construction.

If it can be clearly demonstrated that the old canal must remain a navigable stream, then these sewers must be constructed as inverted siphons under the canal. On the other hand, if we were to pass an ordinance and levy an assessment for such a form of construction, objectors would certainly raise the point that such construction was expensive and unreasonable, and it is probable that their objections would be sustained by the courts.

I have read your letters to Mr. May and the inclosed opinion from the Attorney-General, and assuming that the opinion of the latter is correct, it still remains true that the old canal is still under the jurisdiction of the State of Illinois. The old canal has never been under the jurisdiction of the War Department as a navigable stream. If we must obtain permission from anyone for the crossing of this canal, it must be obtained from the State and not from the National Government. If the construction of the proposed sewer and other acts, either by the city or the State, should result in the abandonment of the canal as a navigable canal, and the opinion of the Attorney-General be correct, then and then only will the lands along the canal revert to the National Government, and such reversion will not affect the right of the public to use

the streets which have for years been open to cross such strips of land. I therefore fail to see any reason why we should ask permission in any form from the National Government for the construction of our sewers.

In regard to the proposed construction of pumping stations, they would be much more expensive to build and operate than the inverted siphons which I have referred to above, and in my opinion there is no occasion for considering the construction of such pumping stations or asking for any appropriation for them. In any event we could not ask for an appropriation for such pumping stations until we had determined upon some definite plan in regard to them. The cost of the Jackson Park avenue pumping station was about $160,000, and while I am uncertain as to the cost of maintenance, I expect it will be about $25,000 a year.

I will try to send you under separate cover some of the plans and maps you ask for, but I am uncertain that I have prints of the Jackson Park avenue sewer system.

Yours, very truly,

C. D. HILL,
Engineer, Board of Local Improvements.

COMMITTEE ON APPROPRIATIONS, HOUSE OF REPRESENTATIVES,
Washington, D. C., February 7, 1907.

Hon. FRED C. STEVENS, *Chairman, Washington, D. C.*

MY DEAR MR. STEVENS: Hon. George A. Schilling, president of the board of local improvements of the city of Chicago, writes me inquiring to what extent freight traffic is still carried on by boat on the Illinois and Michigan Canal north of Joliet, and to what extent interests adjacent to the canal, such as mine, would be affected by the construction of a sewer through the canal at Kedzie and Western avenues, the arch of which would be a considerable height above the bottom of the canal, and thereby necessarily become an impediment to navigation.

In reply to his questions, I beg to say for your information that prior to the completion of the sanitary district drainage channel, which parallels the Illinois and Michigan Canal, the Western Stone Company, of which I am president, ran a large number of boats on the Illinois and Michigan Canal between Lockport, Lemont, and Chicago. Several other companies engaged in similar business did likewise. The amount of tolls paid by my company to the State for the privilege of operating on the Illinois and Michigan Canal sometimes reached $30,000 per annum.

The sanitary district board, under the law, has no right to charge tolls for navigation on the channel constructed by it. All the great industries north of Lockport which shipped by water moved to the drainage channel when it was opened several years ago and now transport their commodities over that waterway.

The result is that between Joliet and Chicago there is now but an occasional grain boat running, and that from the Norton Mills at Lockport. The water supplied to this stretch of the Illinois and Michigan Canal is pumped from the Chicago River at a very great annual expense. The State receives no revenue except from the water power at the Norton Mill at Lockport, to supply which it is necessary to expend the money for the pumping above referred to.

The legislature of the State recently passed a law declaring in favor of the abandonment of the canal from a point near Lockport to Chicago, which law provides for a connection with the sanitary district channe between Lockport and Romeo. This connection is now being constructed. It will be completed within three or four months. After that the Illinois and Michigan Canal traffic will run through the sanitary district channel from the point of the connection, and pumping will no longer be necessary.

I think it is safe to say that the sewer which the city of Chicago seeks authority to construct would, under the circumstances, be no impediment to navigation, because, while there is little or none now, there will be none at all when the connection which I have endeavored to describe is made between the two canals.

Very sincerely, yours,

MARTIN B. MADDEN,
President Western Stone Company.

[H. R. 24271, Fifty-ninth Congress, second session.]

A BILL In relation to the Illinois and Michigan Canal and granting to the State of Illinois all rights, easements, and title of the United States in, to, and into that portion of said said canal lying between the upper basin situated in the city of Joliet and Lake Michigan.

Whereas heretofore the United States, by act of Congress passed on, to wit, March thirtieth, eighteen hundred and twenty-two, authorized the State of Illinois to survey a route for a canal connecting the Illinois River with the southern bend of Lake Michigan, and reserving ninety feet of land on each side of said canal from sale and vesting the same in said State for canal purposes upon certain conditions, reserving certain rights to the United States; and

Whereas, in order to assist the State of Illinois in the construction of said canal, the United States, by act of Congress passed on, to wit, March second, eighteen hundred and twenty-seven, granted to said State a quantity of land equal to one-half of five sections in width on either side of said canal from one end thereof to the other, to be disposed of by said State as it saw fit, for the purpose of constructing said canal; and

Whereas said State of Illinois, by act of legislature passed in eighteen hundred and twenty-nine, duly accepted the grants of Congress aforesaid and surveyed, laid out, and constructed the canal as by said grants proposed, which said canal connected Lake Michigan with the navigable waters of the Illinois River by a channel leading from a point near Utica, Illinois, to a point on the South Branch of the Chicago River about four miles from where said river empties into Lake Michigan, said canal having been constructed and maintained of a size sufficient for canal-boat navigation; and

Whereas said State of Illinois, by act of its legislature passed in eighteen hundred and ninety-nine, provided for the incorporation of the Sanitary District of Chicago, a municipal corporation, and authorized said corporation, for the purpose of providing an outlet for the drainage and sewage of the city of Chicago and contiguous territory, to construct a channel whereby the sewage and drainage of said district was to be carried into the Des Plaines River by water from Lake Michigan, said channel to be of such dimensions and so constructed as to be navigable by the vessels of the Great Lakes and upon its completion to be a navigable stream; and

Whereas the said Sanitary District of Chicago, pursuant to its said authority, has constructed a channel parallel and adjacent to the Illinois and Michigan Canal from the latter's connection with the Chicago River to the said upper basin at Joliet; and

Whereas said channel of said district is of sufficient size and dimensions to accommodate not only canal-boat navigation, but also navigation of the vessels of the Great Lakes, and is completed to within a short distance of said upper basin and will within a few months be connected with said upper basin and will then afford all the accommodation for commerce heretofore afforded by the said Illinois and Michigan Canal between said upper basin and Chicago, and much more; and

Whereas said channel of said Sanitary District of Chicago has been constructed by said district at an expense of nearly fifty millions of dollars, and forms the first section of the deep waterway from Lake Michigan to the Mississippi River; and

Whereas the State of Illinois has authorized said district, upon connecting its channel with the upper basin at Joliet, to cut across and destroy the Illinois and Michigan canal between said points; and

Whereas in the judgment of Congress the old right of way of said Illinois and Michigan Canal between said upper basin and said Chicago River, being adjacent to said right of way of said Sanitary District of Chicago, will be of more service and benefit to the people of that community and of the State of Illinois by being made a part of the said right of way of the Sanitary District of Chicago: Therefore

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and is hereby, granted to the State of Illinois all the rights, easements, interest, and title of every kind and nature now owned or possessed by the United States in, to, and into that portion of the Illinois and Michigan Canal lying and situated between the upper basin in the city of Joliet, Illinois, and Lake Michigan, it being the intention of Congress by this act to give to said State a clear title to the bed, banks, towpath, and reserved lands on either side of said canal, and to all the appurtenances and appliances appertaining and belonging to said canal, including all locks, basins, water rights, water privileges, and water power heretofore possessed and enjoyed by said canal: *Provided, however*, That this grant is made on the express condition that said State will, within six months after the passage of this

act, grant unto the Sanitary District of Chicago all the rights, titles, easements, and privileges hereby granted to it, together with all other property rights, title, interest, and easements which said State has in said portion of said Illinois and Michigan Canal, and in case of the failure of the State of Illinois to comply with the provision of this proviso by granting over to the Sanitary District of Chicago then this act to be null and void.

[Filed by Mr. Charles L. Walker.]

In re title of State to the Illinois and Michigan Canal.

Hon. W. H. STEAD, *Attorney-General:*

Pursuant to your request to give you a brief of authorities having reference to the title of the State to the Illinois and Michigan Canal, and what effect thereon an abandonment of the canal would have and the accuracy of the opinion of Judge-Advocate-General George B. Davis, to the Secretary of War, of date January 31, 1907, in connection with the bill introduced by Mr. Wilson for the transfer of that portion of the canal lying between Joliet and Chicago, I respectfully submit the following:

On March 30, 1822, Congress passed an act authorizing the State to locate a canal through the public lands connecting the Illinois River with Lake Michigan, and granting it 90 feet of land on each side thereof, on condition that the State should survey and file a map of the canal with the Treasury Department within three years, and if the ground should ever cease to be used for a canal for navigation the grant should become void and of no effect.

Under this law no survey was made and no plat filed. Therefore no rights were acquired under it.

In 1826 the legislature memorialized Congress for aid in the construction of such canal, and Congress responded with the act of March 2, 1827, granting to the State in fee one-half of five sections in width on each side of the canal when located, authorizing the legislature to dispose of the same for canal purposes, and no other, and to convey the fee-simple title to purchasers.

Under this act the canal was constructed, and you will notice this act contains no reservation whatever, of reversion or otherwise, but is an absolute grant.

You will note further that the act of March 30, 1822, granted no land to the State except for right of way and 90 feet on each side thereof, while the act of 1827 is a grant of land of five sections in width on each side of the canal when located.

The question of the rights of the State first came to the attention of our supreme court in the case of City of Chicago *v.* McGraw (75 Ill., 566, 572–573).

The court, after quoting the law on page 573, says a strict compliance with the law of 1822 "is made indispensable by the act of Congress to the vesting of the rights conferred in the State."

The court then refers to the memorial of 1826, the act of Congress of 1827, and the act of the legislature of 1829, and on page 574 says:

"The act of Congress of March 2, 1827, does not purport to be an amendment of the act of March 30, 1822, nor does it, even by inference, refer to it. In our opinion these acts constitute distinct and independent offers by the Government of the United States, of aid to the State in the construction of canals, and the latter one having been accepted, without reference to the terms and conditions of the former, the State is only entitled to the grant which it conveys."

This question was next before the supreme court in the case of Werling *v.* Ingersoll (182 Ill., 25), and the court, by reference to the McGraw case there, reaffirms its holdings that the court acquired no rights under the act of 1822.

This last case was taken to the Supreme Court of the United States, and is found reported in the 181st U. S., p. 131, wherein the judgment of our supreme court was affirmed. In that case the court reviews at length the legislation of Congress and the State, and on page 139 says: "It can not be denied that between 1822 and the passage of the act of Congress in 1827, no route had been adopted for the canal and no work of construction had been commenced thereon," and not until after January 22, 1829.

Yet you will note by the express language of the act of 1822 that a map of the route selected must be filed within three years, or the grant should become void and of no effect.

On page 140 the court refers to the difference between the acts of 1822 and 1827, and on page 141 says:

"Upon all the facts in the case it is plain that the act of 1822 was mutually abandoned by the parties so far as it concerned the land grant after the passage of the act of 1827, and that the right of way through the reserved sections was treated and regarded as impliedly granted by the latter act, under which the larger grant was made, and that the map was filed under that act, and none was ever filed under the act of 1822."

These decisions would seem to put beyond all question the fact and law that the canal was built under the law of 1827, and not under the law of 1822, and the law of 1827 granting a fee simple title to the State without any reservation whatever as to title the State is the owner of the canal bed and the right of way as it now exists, and that the Federal Government has no authority over it whatever, and therefore should not pass any legislation with reference to it or attempt to have any control thereover.

The only other provision in the act of 1827 under which any claim could possibly be made is that providing that the canal should forever remain a public highway and give "free use of the canal by the United States Government."

That proviso, however, does not refer to the title granted, and can not be construed as affecting the title.

That this is so shown by the case of Walsh *v.* C. H. V. & A. Rwy. Co., reported in 176 U. S., p. 469.

That case involved the construction of a similar act of Congress granting to the State of Ohio 500,000 acres in aid of construction of canals. That act, like the Illinois act, provided that the land should be sold for the purpose of the construction of the canal, with the same language as to perpetuity and free use by the United States. The legislature of Ohio, in 1894, passed an act abandoning one of the canals and leasing it to a railroad company.

The plaintiff, owning land on both sides of the canal, brought suit to enjoin the railroad company from constructing the railroad as in violation of the act of Congress granting the land and the Constitution of the United States as impairing that contract. The supreme court of the State of Ohio held that the complainant had no cause of action and that the act of the legislature of Ohio was not in violation of the act or the Constitution, and the Supreme Court of the United States affirmed this holding, and on pages 477–478 declare that the "proposed use of the right of way for a railway was an analogous public use to that of the canal, and was not in violation of the act of Congress or the Constitution."

This decision clearly holds that even though the legislature of Illinois had in fact abandoned the Illinois and Michigan Canal, that it could, nevertheless, use it for other "public highway purposes."

The fact is, however, that the legislature of Illinois has not abandoned the canal, but it still using it, and therefore no possible question of abandonment or loss of title is now presented which would even give Congress "the co'or of right" to intermeddle by passing the Wilson bill or any act relating to the Illinois and Michigan Canal.

Respectfully submitted.

C. L. WALKER.

[Filed by Mr. Robert R. McCormick.]

ILLINOIS AND MICHIGAN CANAL.

By the provision of the constitution of 1870 the Illinois and Michigan Canal can never be sold or leased until the specific proposition for the sale or lease thereof shall first have been submitted to the vote of the people of the State at a general election and have been approved by a majority of the votes polled at such election. Whether this provision would apply to a sale to the sanitary district is a question of legal construction.

The Illinois and Michigan Canal was completed in 1848, and for a number of years was used as a means of transportation of freight and passengers by canal boats, and up to about the time of the adoption of the constitution performed a great service in that respect. At the time of the constitutional convention in 1870 the continued prosperity of the canal was in such grave doubt that a provision was enacted preventing the State's credit being loaned for the purpose of aiding the canal and confining its expenditures for enlargement and improvement to its surplus earnings.

The falling off in tolls from 1875 to 1901, together with disbursements during the same period, is shown in the following table:

Year.	Gross expenses.	Tolls.	Year.	Gross expenses.	Tolls.
1875	$74,511	$107,081	1889	$85,478	$60,605
1876	91,595	113,293	1890	75,125	55,112
1877	110,018	96,113	1891	72,592	49,557
1878	82,330	84,330	1892	67,137	54,937
1879	97,701	89,064	1893	59,522	38,702
1880	125,601	92,926	1894	54,258	44,928
1881	108,223	85,130	1895	71,942	39,106
1882	104,412	85,947	1896	77,552	32,100
1883	116,756	77,975	1897	63,307	33,065
1884	99,289	77,102	1898	78,986	38.570
1885	86,393	66,800	1899	91,196	41,021
1886	72,430	62,513	1900	88,317	13,867
1887	71,385	58,024	1901	111,002	8,120
1888	76,845	56,028			

In 1903 an attempt to secure funds needed for the maintenance of the canal was defeated by injunction in the suit of Burke *v.* Snively, and the canal is now without means except such as are earned from its ice privileges, sale of lands, rental of water power, and money derived from condemnation proceedings. From 1886–87 to 1899–1900 the total receipts of the canal from every source and its disbursements were as follows:

Year.	Total receipts.	Total disbursements.	Year.	Total receipts.	Total disbursements.
1886–87	$90,637.76	$78,608.69	1893–94	$69,834.71	$57,500.39
1887–88	84,084.00	83,340.59	1894–95	86,068.51	75,948.79
1888–89	100,937.51	90,188.00	1895–96	61,432.35	82,700.15
1889–90	82,680.66	80,458.27	1896–97	101,492.32	74,175.09
1890–91	79,005.01	79,300.07	1897–98	111,118.13	78,987.74
1891–92	79,328.64	72,912.10	1898–99	131,439.28	91,196.76
1892–93			1899–1900	109,521.03	88,317.00

The above included legislative appropriations made from time to time in spite of the constitutional provision, namely:

1879, for maintenance	$30,000
1891, to renew gates and make necessary repairs in Henry and Copperas Creek locks	25,000
1897, for repairs	100,000
1899, for unforeseen emergency	50,000
1901, for extraordinary expenses	150,000
1903, for maintaining navigable conditions, etc	152,950

For many years the canal has been practically useless as a waterway, and the traffic over it has steadily diminished until now it is practically nothing. The completion of the main drainage channel from Robey street, Chicago, to Lockport (now in course of completion to Joliet, where it will connect with the Illinois and Michigan Canal) has substituted a deep waterway paralleling the Illinois and Michigan Canal between these points and has made its use as a waterway a thing of the past, even were it not now practically filled up and abandoned. That part of the canal is to-day a burden to the State, producing an income of $11,000, which is wiped out by one single charge for operating the Bridgeport pumping station at $18,000 per annum. Its items of receipts are as follows:

From Norton & Co.:	
For water power under 13-year lease, lot 1, block 122	$300
For water power under 13-year lease, lot 6, block 122	200
Surplus water on 20-year lease	10,000

The Bridgeport pumping works were formerly operated by the city until the completion of the drainage canal, when the city abandoned their operation and the Illinois and Michigan Canal commissioners were compelled to operate them at a cost of $25,000 per annum solely for supplying water power under their contract with

Norton & Co. In 1902 an electric plant was put in and paid for out of the appropriation by the legislature, at a cost of $——, which is supplied with power from the Economy Light and Power Company at Joliet, by wire running along the right of way of the Illinois and Michigan Canal from Joliet to the Bridgeport pumping works.

The Illinois and Michigan Canal commissioners present various arguments against abandoning the canal, namely, that it is a connecting link between Lake Michigan and the Illinois and Mississippi rivers and the Hennepin Canal, and that there is still some transportation along its route.

Unquestionably the canal was important as a regulator of freight rates years ago, but is no longer so, the total number of boats reported to be running upon it in 1902 being but 41.

Although originally considered important in connection with the construction of the proposed ship canal, it is no longer so. The route of the proposed ship canal will not take into consideration the existence of the Illinois and Michigan Canal.

The principal argument of the canal commissioners, namely, the importance of the canal as a regulator of freight rates for transportation, admitting that it is used for any boats at all at the present time, does not affect that part of the canal which parallels the main drainage channel, as the channel has become a substitute in the matter of transportation.

The right of way of the canal can be made of great utility to the sanitary district in connection with its plan of real-estate development, and a conveyance of the Illinois and Michigan right of way to the district will relieve the State of an annual drain upon its treasury and open the way for converting this right of way into a useful and income-bearing property.

BRIEF.

Five hundred thousand dollars were ceded by the United States to Illinois for the building of the Illinois and Michigan Canal, under the following proviso:

"*Provided*, That said canal when completed shall be and forever remain a public highway for the use of the Government of the United States, free from any toll or other charge for any property of the United States, or persons in their service, passing through the same: *Provided*, That such canal shall be commenced within five years and completed within twenty years, or the State shall be bound to pay to the United States the amount of land previously sold, and that the title to the purchasers under the State shall be valid."

It has been contended that the proviso constituted a contract between the State of Illinois and the United States obligating the State to forever keep and maintain the canal as a public highway.

In the case of Walsh *v.* Columbus, Hocking Valley and Athens Railroad Company (176 U. S., 469), where a cession of lands to the State of Ohio for canal purposes was made by the Government upon a similar condition, upon the sale of the canal which operated to throw it into disuse, the contract question was raised. The clause thereof read as follows:

"*Provided*, That the said canals when completed, shall be and forever remain public highways for the use of the Government of the United States, free from any toll or charge whatever for any property of the United States or persons in their service passing along the same."

In passing upon the contract question the Supreme Court of the United States used this language:

"The object of the act was to facilitate and encourage public improvements, but not to stand in the way of the adoption of more perfect methods of transportation which might thereafter be discovered. Had the question of internal improvements arisen ten or fifteen years later, when railways began to be constructed, it is quite improbable that the State would have embarked upon this system of canals or that courts would have aided it in the enterprise. Waiving the question whether the State could have abandoned the lands upon which these canals were built as public highways, we think it entirely clear that Congress could not have intended to tie the State down to a particular method of using them when subsequent experience has pointed out a much more practicable method which has supplanted nearly all the canals then in use.

"There was no undertaking to keep up the canals for all time, and we think the proper construction of the proviso is that the Government should be entitled to the free use of the canals so long as they were maintained as public highways, and that the act of 1894 leasing these lands to the defendant for analogous purpose, it is no violence to the contract clause of the constitution."

Our own court, in the case of Burke *v.* Snively (208 Ill., 358), discusses this question of contract with the United States, but does not decide it. This same court holds that "the canal has practically fallen into disuse for any of the purposes of transportation of either persons or property, and has been perverted to mere commercial purposes of supplying water power to those along its banks and selling privileges to cut ice from its pools. It is no longer a highway of commerce."

So that the question of abandonment as a highway of commerce seems practically to have been disposed of as matters stand at present. The conveyance of the canal right of way from Chicago to Joliet would not be an abandonment but really a substituting of another highway of commerce in lieu thereof.

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Mr '08